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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD L. and KATHERINE E. COUCHOT,
Petitioners,

v.

THE STATE LOTTERY COMMISSION,
THE OHIO DEPARTMENT OF TAXATION, and
J. KENNETH BLACKWELL,
TREASURER OF THE STATE OF OHIO,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the "physical-presence" test for "substantial nexus" which this Court articulated in *Quill Corp. v. North Dakota* apply to state income taxes?

2. Does a State violate the Commerce Clause or the Due Process Clause when it taxes the income of an individual who is a nonresident of that State, and whose only connection with that State is a monetary debt which the State owes the nonresident, which the State pays in annual installments over twenty years, and which produces the income being taxed?

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PETITION FOR WRIT OF CERTIORARI

Richard L. and Katherine E. Couchot respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 659 N.E.2d 1225. That opinion is reprinted in Appendix A to this petition. The opinions of the Franklin County Court of Appeals and the Franklin County Court of Common Pleas are unreported. Those opinions are reprinted in Appendices B and C, respectively, to this petition.

JURISDICTION

The Ohio Supreme Court entered its judgment in this case on February 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, clauses 1 and 3 of the United States Constitution provide that "[t]he Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."

The relevant portions of sections 1, 12 and 13 of Amended Substitute House Bill Number 111, 1989-1990 Ohio Laws 2330-2833 (effective July 1, 1989) ("House Bill 111"), are reprinted in Appendix D to this petition.

STATEMENT

This case involves a nonresident of Ohio who won the Ohio lottery when Ohio did not tax the lottery winnings of nonresidents, and Ohio's subsequent attempt to tax that nonresident's income. This case raises significant constitutional questions which are important to a broad spectrum of individuals *and* businesses. In upholding the taxation of this nonresident's income, the Ohio Supreme Court employed reasoning which could be used by any other State to tax any income an individual or business receives from intangible property which has at any time been associated with the taxing State. Such limitless taxation merits this Court's review.

A. The Factual Background of this Case.

On March 2, 1988, Richard L. Couchot, a resident of Ashland, Kentucky, crossed the Ohio River, purchased an Ohio lottery ticket in Ironton, Ohio, and returned home. That evening, the six numbers on Mr. Couchot's ticket were selected as the winning combination of numbers. As a result, Mr. Couchot won a prize of $21,000,000, payable by the State of Ohio in twenty equal annual installments. On March 7, 1988, Mr. Couchot traveled to Columbus, Ohio to redeem his winning ticket. App. A 1a.

Since March 1988, the Couchots have had no connection with Ohio, other than the connection which arises from the debt Ohio owes Mr. Couchot, and the annual payment Ohio mails to Mr. Couchot in Florida.[1] The Couchots have never been Ohio residents; have never owned or leased any property in Ohio; have never registered to vote in Ohio; have never held an Ohio driver's license; have never had a bank account in Ohio; and have never been employed or conducted any business in Ohio. App. B 27a.

On July 1, 1989, Ohio enacted House Bill 111, which changed Ohio law to impose Ohio's income tax on the lottery winnings of nonresidents. App. D.[2] Pursuant to this legislation, Ohio began witholding its income tax from Mr. Couchot's lottery prize payments in 1989, and has forced Mr. Couchot to pay Ohio income tax on each of his 1989 through 1995 lottery prize payments. App. A 2a.

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[1] Mr. and Mrs. Couchot moved from Ashland, Kentucky to Englewood, Florida in May, 1988. App. A 2a.

[2] Respondents argued before the trial court and the court of appeals that House Bill 111 did not change Ohio law, but merely "clarified" it. Respondents abandoned this argument before the Ohio Supreme Court. As a result, the Ohio Supreme Court assumed that House Bill 111 changed Ohio law, and that the Ohio lottery winnings of nonresidents were not subject to Ohio's income tax before July 1, 1989. App. A 2a n.1.

B. The Proceedings Below.

On May 2, 1990, the Couchots filed a complaint with the Franklin County Court of Common Pleas. The Couchots asserted that, because they were nonresidents, Ohio's tax on their income violated the Due Process and Commerce Clauses of the United States Constitution. The Common Pleas Court summarily rejected each of these claims. App. C 44a-45a.[3]

The Couchots then appealed to the Franklin County Court of Appeals and raised the same claims. App. B 16a-17a. The Court of Appeals ruled that Ohio's tax on Mr. Couchot's income violated the Due Process Clause. App. B 25a-28a. The Court of Appeals reasoned as follows. It first noted that, based on this Court's decisions in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and *International Harvester Co. v. Wisconsin Dep't of Taxation*, 322 U.S. 435 (1944), the Couchots did not have a constitutional nexus with Ohio after March 1988. The Court of Appeals reasoned that, in the absence of such nexus, Ohio's application of House Bill 111 to the Couchots was necessarily based on events which took place in March 1988, before Ohio taxed this income. Thus, the Court of Appeals concluded that Ohio's application of House Bill 111 to the Couchots was a retrospective application of that law, in that its application was governed by events which took place before its enactment. App. B 27a-28a.[4]

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[3] The Couchots also asserted that House Bill 111: (1) breached Mr. Couchot's contract with the State of Ohio; (2) violated the Contract Clauses of the United States and Ohio Constitutions, U.S. Const. art. I, § 10, Ohio Const. art. II, § 28; and (3) violated the Ohio constitutional prohibition against retroactive laws, Ohio Const. art. II, § 28. App. C 36a. The Common Pleas Court rejected the first and second of these arguments, App. C 39a-42a, and agreed with the third only as it related to the lottery prize payments Mr. Couchot received before July 1, 1989, the effective date of House Bill 111. App. C 43a-44a.

[4] The Court of Appeals declared the Couchots' remaining assignments of error moot. App. B 29a-30a. Thus, the Court of Appeals did not decide whether House Bill 111 breached Mr. Couchot's contract with Ohio, or violated the Contract Clauses of the United States and Ohio Constitutions. Because the Court of Appeals did not decide these arguments, the Ohio Supreme Court should have considered them after it reversed the Court of Appeals on the Couchots' other claims. For whatever reason, the Ohio Supreme Court refused to do so, and also refused to remand the case to the Court of Appeals so *it* could do so. *But see United States Trust Co. v. N.J.*, 431 U.S. 1, 23-25 (1977); *Murray v. Charleston*, 96 U.S. 432 (1877); *In re State Tax on Foreign-Held Bonds*, 82 U.S. (15 Wall.) 300 (1872).

Respondents then filed a discretionary appeal with the Ohio Supreme Court, which was granted. 641 N.E.2d 1112. The Supreme Court reversed the Court of Appeals.

In rejecting the Couchots' Due Process arguments, the Court essentially relied on only one case: *International Harvester*. The Court concluded that Ohio had a sufficient nexus with Mr. Couchot to satisfy the Due Process Clause in 1989 and thereafter, because it was the Ohio lottery Mr. Couchot had played and won in 1988. App. A 7a-8a. The Court ruled that the nexus Mr. Couchot created in 1988, without more, will last for twenty years.

As for the Couchots' Commerce Clause arguments, the Supreme Court began by quoting this Court's decision in *Quill*, recognizing that the Commerce Clause imposes different jurisdictional limitations on a State's power to tax than does the Due Process Clause. App. A 10a. The Court then rejected the "physical-presence" definition of "substantial nexus" which this Court articulated in *Quill*. App. A 11a. In so doing, the Supreme Court decided—without any analysis—a question this Court expressly left unanswered in *Quill*: whether the "physical-presence" test applies to income taxes. *Quill* at 314 ("[W]e have not, in our review of other types of taxes, articulated the same physical-presence requirements that [*National Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967)] established for sales and use taxes.") The Ohio Supreme Court then cited only one

case—*Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993), *cert. denied*, 114 S. Ct. 550 (1993)—and held that Ohio can tax the Couchots in 1989 and thereafter, even without their having any physical presence in Ohio since March 1988. App. A 11a.

Finally, as for the Couchots' retroactivity claims, the Supreme Court ruled that the Court of Appeals erred when it commingled the issues of due process and retroactivity, and that Mr. Couchot's nexus in March 1988 was more than sufficient to allow Ohio to tax him in 1989 and thereafter. App. A 12a-14a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT NEEDS TO DEFINE THE COMMERCE CLAUSE AND DUE PROCESS CLAUSE LIMITATIONS ON A STATE'S JURISDICTION TO TAX THE INCOME FROM INTANGIBLE PROPERTY OWNED BY NONRESIDENT INDIVIDUALS AND FOREIGN CORPORATIONS WHICH LACK A PHYSICAL PRESENCE IN THE TAXING STATE.

One of the constitutional questions in this case is whether Ohio has the authority to impose its income tax on Mr. Couchot, a nonresident individual.[5] This

[5] The constitutional question in this case is *not* whether Ohio has the authority to tax the income from an *event* which occurred in Ohio. *See N.Y. ex rel. Whitney v. Graves*, 299 U.S. 366 (1937). *Cf., e.g., Barclays Bank PLC v. Cal. Franchise Tax Bd.*, 114 S. Ct. 2268 (1994); *Allied-Signal, Inc. v. Director*, 504 U.S. 768 (1992); *ASARCO, Inc. v. Idaho Tax Comm'n*, 458 U.S. 307 (1982); *Exxon Corp. v. Wis. Revenue Dep't*, 447 U.S. 207 (1980); *Mobil Oil Corp. v. Vt. Tax Comm'r*, 445 U.S. 425 (1980). The question is whether Ohio has the authority to tax *Mr. Couchot*. This subtle but significant distinction eluded the Ohio Supreme Court, which ruled that Ohio could tax Mr. Couchot because the *event* which produced Mr. Couchot's lottery winnings occurred in Ohio. App. A 8a, 11a. However, the location of the event which produced Mr. Couchot's income is not relevant here, because Ohio is seeking to impose an *income tax*, *not* an *excise* tax (*i.e.*, a tax on the privilege of engaging in a particular activity). Thus, the question that must be answered

Court has not addressed this question in almost 125 years. *See In re State Tax on Foreign-Held Bonds, supra.*[6] Moreover, the Ohio Supreme Court's decision raises substantial questions regarding a State's authority to tax the income of a forign corporation which lacks a physical presence in the taxing State, a question this Court has never addressed.[7] Because they lack this Court's guidance, federal and state courts throughout this country are analyzing this issue in contradictory ways.

is whether Ohio has a sufficient nexus with *Mr. Couchot*, *not* with the event that produced his income. *Allied-Signal* at 778 ("[I]n the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax. The constitutional question in a case such as *Quill Corp.* is whether the State has the authority to tax the corporation at all.") The Ohio Supreme Court has recognized this distinction before, but ignored it in this case. *See American Home Products Corp. v. Limbach*, 551 N.E.2d 201 (Ohio 1990).

[6] Respondents will argue that this Court addressed this question in *International Harvester*. The Couchots submit that *International Harvester* involved a tax on a foreign corporation which had a physical presence in the taxing State. *See* pp. 11-12, *infra*.

[7] This Court has decided cases involving the constitutional limitations on a State's jurisdiction to impose an income tax on a foreign corporation. *See, e.g., Northwestern States Portland Cement Co. v. Minn.*, 358 U.S. 450 (1959); *International Harvester Co. v. Wis. Dep't of Taxation, supra.* But these cases involved corporations which had a physical presence in the taxing State. This Court has also decided cases involving the constitutional limitations on a State's jurisdiction to tax a foreign corporation which lacked a physical presence in the taxing State, but these cases did not involve an income tax. *See, e.g., Quill Corp. v. N.D., supra; National Bellas Hess, Inc. v. Dep't of Revenue of Ill., supra.* It is unclear whether these latter cases are authoritative with respect to the constitutional limitations on a State's jurisdiction to impose an income tax on a foreign corporation which lacks a physical presence in the taxing State.

II. THE OHIO SUPREME COURT'S DECISION CONTRADICTS *IN RE STATE TAX ON FOREIGN-HELD BONDS*.

When House Bill 111 took effect, the only connection Mr. Couchot had with Ohio was that Ohio owed him money. But this Court has ruled that a State's nexus with a nonresident individual must be greater before it can tax the income of that nonresident.

In *In re State Tax on Foreign-Held Bonds*, this Court considered whether Pennsylvania could require a railroad incorporated under Pennsylvania law to withhold a tax from the interest it was contractually required to pay its bondholders.[8] Nearly all of the railroad's bonds were held by nonresidents of Pennsylvania. In striking down Pennsylvania's tax as it applied to the nonresident bondholders, this Court held that:

> The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. . . .
>
> Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. . . .
>
> *The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The law which requires the treasurer of the company to retain five per cent of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power.*

82 U.S. (15 Wall.) at 319-320 (emphasis added). *See also Railroad Co. v. Jackson*, 74 U.S. (7 Wall.) 262 (1868) (holding that Pennsylvania could not impose an identical tax on bonds held by a resident of Ireland). The Couchots' situation is indistinguishable from that of the nonresident bondholders in *In re State Tax on Foreign-Held Bonds* and *Railroad Co. v. Jackson*. Ohio owes Mr. Couchot a debt. Mr. Couchot is a Florida resident. He has never been an Ohio resident. App. B 24a. Thus, Ohio's debt to him is located in Florida, not Ohio. *In re State Tax on Foreign-Held Bonds, supra*; *Railroad Co. v. Jackson, supra*. *See also Farmers Loan & Trust Co. v. Minn.*, 280 U.S. 204 (1930); *Baldwin v. Mo.*, 281 U.S. 586 (1930). As a result, Ohio's attempt to tax the income arising from that debt is unconstitutional and merits this Court's review.

This Court's decisions in *Shaffer v. Carter*, 252 U.S. 37 (1920), and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), are instructive, because they appear to define the outer limits on a State's authority to tax a nonresident individual. In *Shaffer v. Carter*, this Court considered whether Oklahoma could impose its income

[8] The Pennsylvania tax at issue in *In re State Tax on Foreign-Held Bonds* was a property tax, but its operation and economic effect were identical to an income tax. Consequently, this Court should view it as an income tax. *Shaffer v. Carter*, 252 U.S. 37, 55 (1920) ("[W]here the question is whether a state taxing law contravenes rights secured by [the Constitution], the decision must depend . . . upon the practical operation and effect of the tax imposed.")

tax on the income an Illinois resident earned from his Oklahoma business operations. In *Travis v. Yale & Towne Mfg. Co.*, this Court considered whether New York could impose its income tax on the income nonresidents of New York earned by working in New York. This Court held in both cases that a State has the authority to tax a nonresident individual. But this Court limited a State's jurisdiction to tax to the income from property located or business conducted in that State. *Shaffer* at 52-53; *Travis* at 75. This Court has cited *Shaffer* frequently, most recently less than one year ago. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S. Ct. 2214, 2222 n. 11 (1995). But while *Shaffer* retains its validity, this Court has never expanded its reach to a nonresident who lacks a physical presence in the taxing State.

The Couchots' situation falls outside the jurisdictional sphere this Court defined in *Shaffer* and *Travis*. When House Bill 111 took effect, the Couchots were not conducting any occupation or business in Ohio, App. B 27a, and did not own or use any property in Ohio. *In re State Tax on Foreign-Held Bonds, supra*; *Railroad Co. v. Jackson, supra*; *Farmers Loan & Trust Co. v. Minn., supra*; *Baldwin v. Mo., supra*. The Couchots' only contact with Ohio was and is that Ohio owes Mr. Couchot a debt. But that is not enough. *Shaffer v. Carter*; *Travis v. Yale & Towne Mfg. Co.* Moreover, the fact that Mr. Couchot receives an annual payment from Ohio falls short of creating the nexus the Constitution demands. *Cf. Quill, supra* (holding that a foreign corporation did not have a "substantial nexus" with a State into which it mailed catalogues and other advertising materials on a regular and systematic basis).

III. THE OHIO SUPREME COURT'S RELIANCE ON *INTERNATIONAL HARVESTER* ILLUSTRATES WHY THE LACK OF GUIDANCE IN THIS AREA IS PROBLEMATIC.

In rejecting the Couchot's Due Process arguments, the Ohio Supreme Court relied exclusively on *International Harvester*. That case involved Wisconsin's Privilege Dividend Tax on corporations, *id.* at 437, and is either irrelevant or wrong.

First, the Ohio Supreme Court read *Harvester* as involving a tax on nonresident individuals. App. A 7a. But despite certain language in *Harvester* which is admittedly to the contrary, this Court has consistently treated *Harvester* as defining a State's jurisdiction to tax a foreign *corporation*. Since it was decided, this Court has cited *Harvester* on four separate occasions to support the conclusion that a State can tax a foreign *corporation*. *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 356 n.18 (1954); *International Shoe Co. v. Wash.*, 326 U.S. 310, 321 (1945); *Memphis Natural Gas Co. v. Miss. Tax Comm'n*, 19 So. 2d 477 (1944), *appeal dismissed*, 323 U.S. 682, 683 (1945); *Parke, Davis & Co. v. Cook*, 31 S.Ed.2d 728 (1944), *appeal dismissed*, 323 U.S. 681, 682 (1945). This Court has never cited *Harvester* in any case involving the constitutional limitations on a State's jurisdiction to tax a nonresident *individual*. Indeed, in *Miller Brothers*, this Court was careful to include *Harvester* in the portion of footnote 18 relating to a State's jurisdiction to tax a foreign *corporation*, but to exclude *Harvester* from the portion of that same footnote relating to a State's jurisdiction to tax a nonresident *individual*. *Id. See also Okla. Tax Comm'n v. Chickasaw Nation* at 2222 n.11 (1995) (omitting any reference to *Harvester*). This Court's treatment of *Harvester* proves its true sentiments toward that case.

Second, *Harvester* involved a Due Process challenge to the Wisconsin tax. No Commerce Clause challenge was

raised. *Harvester* at 439. This is important because *Harvester* was decided more than *fifty years* ago, and has not been cited by this Court in any relevant context for more than *forty years*. *Harvester* was thus decided—and last cited—*before* this Court decided *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1976), and the many cases which have applied it. *See, e.g., Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 115 S.Ct. 1331 (1995); *Barclays Bank PLC v. Cal. Franchise Tax Bd., supra*; *Quill Corp. v. N.D., supra*; *Amerada Hess Corp. v. N.J. Dep't of Treasury*, 490 U.S. 66 (1989); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1987); *Tyler Pipe Industries, Inc. v. Wash. Dep't of Revenue*, 483 U.S. 232 (1987); *Exxon Corp. v. Wis. Dep't of Revenue, supra*; *Wash. Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734 (1977); *National Geographic Society v. Cal. Bd. of Equalization*, 430 U.S. 551 (1977). That fact alone raises substantial doubts as to *Harvester*'s vitality.

The proper characterization of *Harvester* is pivotal. If *Harvester* involved a tax on a foreign corporation, it is an unremarkable decision, given Harvester's substantial activities and presence in Wisconsin. *See, e.g., Northwestern Portland States Cement Co. v. Minn., supra.* On the other hand, if *Harvester* involves a tax on nonresident individuals, it is an extremely remarkable decision and one which, we submit, is wrong. This Court should accept this case to decide whether *Harvester* articulates the proper jurisdictional standard under either the Due Process or Commerce Clause. If *Harvester* is good law, this Court should say so. If it is not, this Court should overrule it.

IV. THE OHIO SUPREME COURT'S DECISION CONTRADICTS THE DECISIONS OF OTHER FEDERAL AND STATE COURTS.

Because this Court has decided few cases involving the limitations on a State's power to impose an income tax on a nonresident individual or foreign corporation, the lower courts have looked elsewhere for guidance. Many courts have resorted to this Court's decisions regarding the limitations on a State's power to impose non-income taxes on foreign corporations, including, especially, *Quill Corp. v. North Dakota*. These efforts have produced mixed results.

To date, since *Quill* was decided, almost *all* of the lower federal and state courts which have considered the issue have adopted *Quill*'s physical-presence standard in analyzing the jurisdictional limitations on a State's power to impose income or income-based taxes. *Polychrome Int'l Corp. v. Krigger*, 5 F.3d 1522 (3d Cir. 1993); *Laptops Etc. Corp. v. D.C. (In re Laptops Etc. Corp.)*, 164 B.R. 506 (Bankr. D.Md. 1993); *Watlow Winona, Inc. v. Comm'r of Revenue*, 495 N.W.2d 427 (Minn. 1993); *Ontario Trucking Ass'n v. N.Y. Dep't of Taxation*, Case No. 96-117, 1996 N.Y. Misc. LEXIS 44 (N.Y. Sup. Ct. January 12, 1996); *Erieview Cartage, Inc. v. Pa.*, 654 A.2d 276 (Pa. Commw. Ct. 1995); *Lawrence Indus., Inc. v. Sharp.*, 890 S.W.2d 886 (Tex. Ct. App. 1994), *cert. denied*, 116 S.Ct. 708 (1996); *Short Brothers (USA), Inc. v. Arlington County*, 423 S.E.2d 172 (Va. 1992). To date, many of the lower federal and state courts which have considered the issue have also adopted *Quill*'s physical-presence standard in analyzing the jurisdictional limitations on a State's power to impose *other* types of taxes (other than sales or use taxes). *Gillette Co. v. Mich.*, 497 N.W.2d 595 (Mich. Ct. App. 1993), *appeal denied*, 519 N.W.2d 156 (Mich. 1994), *cert. denied*, 115 S.Ct. 779 (1995) (applying *Quill*'s physical-presence test to Michigan's single business tax); *Guardian Indus. Corp. v. Mich.*, 499 N.W.2d 349

(Mich. Ct. App. 1993), *appeal denied sub nom. Cargill, Inc. v. Mich.*, 512 N.W.2d 846 (Mich. 1994) (applying *Quill*'s physical-presence test to Michigan's single business tax); *Beelman Truck Co. v. Bd. of Equalization*, 861 S.W.2d 557 (Mo. 1993) (applying *Quill*'s physical-presence test to Missouri's personal property tax); *Diamond Shamrock Ref. & Mktg. Co. v. Appraisal District*, 876 S.W.2d 298 (Tex. 1994), *cert. denied*, 115 S.Ct. 500 (1994) (applying *Quill*'s physical-presence test to Texas' personal property tax); *Vinmar, Inc. v. Appraisal District*, 890 S.W.2d 493 (Tex. Ct. App. 1994) (applying *Quill*'s physical-presence test to Texas' personal property tax); *Ryder Truck Rental, Inc. v. Chesterfield County*, 449 S.E.2d 813 (Va. 1994) (applying *Quill*'s physical-presence test to Virginia's personal property tax).

To date, only two reported decisions have refused to adopt *Quill*'s physical-presence standard in analyzing the jurisdictional limitations on a State's power to impose income taxes: the Ohio Supreme Court's decision in this case, and the South Carolina Supreme Court's decision in *Geoffrey*.[9] Not surprisingly, the Ohio Supreme Court relied on *Geoffrey* in rejecting, without any analysis, the Couchots' Commerce Clause arguments. App. A 11a. The Ohio Supreme Court's decision is thus in the distinct minority in this field of jurisprudence.

The conflict between the States on this question illustrates again why this Court should grant this petition. This Court should use this case to clarify the limitations on a State's power to impose an income tax. This Court may have declined to review *Geoffrey* to afford the States more time to consider this issue. Because of the importance of this question, however, the Couchots respectfully submit that sufficient time has passed and that their case is an appropriate vehicle for this Court to decide the issue. Whether *Quill*'s physical-presence standard applies to income taxes or not, this Court should use this case to say so.

[9] *Geoffrey* is widely viewed as an important case in the field of State taxation. Six *amici* filed briefs with this Court during the *certiorari* stage of that case. Moreover, the decision of the South Carolina Supreme Court in *Geoffrey* has been frequently cited and discussed by commentators.

V. THE OHIO SUPREME COURT'S DECISION EXPOSES THE DANGERS OF NOT HAVING A CLEARER DEFINITION OF A STATE'S JURISDICTIONAL LIMITATIONS.

The Ohio Supreme Court's decision has made Ohio's jurisdiction to tax boundless. According to that Court, Ohio has jurisdiction to tax the income received by any nonresident of Ohio from any source which is or has at any time in the past had a nexus with Ohio. As a result of that conclusion, any individual who purchases an annuity from an Ohio insurance company could forever be subject to Ohio tax on the annuity income. Any individual who deposits money in an Ohio financial institution could forever be subject to Ohio tax on the interest income. Any individual who invests in a corporation which does business in Ohio could forever be subject to Ohio tax on the dividend income. The Ohio Supreme Court has essentially ruled that nexus, once created, can never be destroyed. Such limitless taxation violates the controlling constitutional precedents, and warrants this Court's review.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF OHIO
JANUARY TERM, 1996

No. 94-1771

RICHARD L. COUCHOT

v.

THE STATE LOTTERY COMMISSION

Submitted November 15, 1995
Decided February 7, 1996

Appeal from the Court of Appeals for Franklin County
No. 93APE09-1337

STATEMENT OF THE CASE

On March 2, 1988, appellee Richard L. Couchot, then a resident of Ashland, Kentucky, purchased an Ohio Super Lotto ticket in Ironton, Ohio. That evening, the six numbers appearing on Couchot's ticket were selected as the winning combination of numbers for the March 2, 1988 Super Lotto drawing. As a result, Couchot became the sole winner of the total cash prize of $21,000,000. On March 7, 1988, Couchot traveled to Columbus to redeem his winning ticket.

Pursuant to former Ohio Adm.Code 3770:1-8-04 (C)(3), 1987-1988 Ohio Monthly Record 1159, the prize

was payable in twenty annual installments. Accordingly, on March 22, 1988, Couchot received his first check, which totaled $840,000, reflecting the first installment payment of $1,050,000 less $210,000 withholding for federal income tax purposes. In May 1988, Couchot and his wife, appellee Katharine Couchot, moved to Englewood, Florida. In March 1989, Couchot received his second check for $840,000.

Effective July 1, 1989, the General Assembly enacted Am.Sub.H.B. No. 111, 143 Ohio Laws, Part II, 2330, 2615, which, among other things, amended R.C. 5747.02 to provide for an annual income tax "on every individual and estate earning or receiving lottery winnings, prizes or awards pursuant to Chapter 3770. of the Revised Code."[1]

Pursuant to this amendment, the Couchots have filed joint income tax returns with the state of Ohio under protest for the tax years ending December 31, 1989 and thereafter, reflecting their Ohio lottery winnings received each year as Ohio adjusted gross income.[2]

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[1] The operative language of R.C. 5747.02 has remained unchanged through three subsequent amendments. Also, Am.Sub.H.B. No. 111 amended R.C. 5747.01(C) to include "lottery winnings, prizes, and awards" within the definition of "nonbusiness income." 143 Ohio Laws, Part II, 2613. Additionally, Am.Sub.H.B. No. 111 enacted R.C. 5747.062, *id.* at 2621, effective January 1, 1990, to require the state lottery commission to deduct and withhold three and one-half percent of each lottery prize award payment that exceeds $5,000. See, also, R.C. 3770.072.

There was some argument below concerning whether Am.Sub. H.B. No. 111 "changed" or "clarified" existing law. It was appellants' contention that prior to the enactment of Am.Sub.H.B. No. 111, Ohio lottery winnings by nonresidents were subject to Ohio income tax. Appellants have since abandoned their argument in this regard. Thus, for purposes of this appeal, the court will assume that Am.Sub.H.B. No. 111 represents a change of preexisting income tax law.

[2] Because R.C. 5747.062 was not effective until January 1, 1990, no amount of Ohio tax was deducted and withheld from Couchot's March 1989 check, but, on April 16, 1990, the Couchots filed a joint return for 1989 and paid $70,002.68 in Ohio income tax on the March 1989 installment.

All checks received after January 1, 1990, however, beginning with the third installment check received by Couchot in March 1990, reflected a withholding of $36,750 for Ohio income tax purposes. At the end of each taxable year for the years 1990 and thereafter, the Couchots paid the difference between what was withheld and what was owed on their respective tax returns.

On May 2, 1990, the Couchots filed a complaint, later amended, against appellants, the State Lottery Commission, the Department of Taxation, and Mary Ellen Withrow, Treasurer, State of Ohio, challenging the imposition of Ohio income tax[3] on their lottery winnings. The complaint alleged breach of contract; a violation of the Contract Clauses of the United States and Ohio Constitutions, Section 10, Article I of the United States Constitution and Section 28, Article II of the Ohio Constitution; a violation of the prohibition against retroactive laws under Section 28, Article II of the Ohio Constitution and R.C. 1.58; and a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law Clause under Section 16, Article I of the Ohio Constitution. In addition, the Couchots argued to the trial court that the tax violated the Commerce Clause, Clause 3, Section 8, Article I of the United States Constitution.

The trial court overruled all of the challenges to the tax, except for finding that the tax, as applied to Couchot's March 1989 installment, "constitutes retrospective application of [amended R.C. 5747.02] and to this extent violates R.C. 1.58 and [Section 28, Article II of] the Ohio Constitution."

The court of appeals reversed the trial court on the issue of retroactivity for tax years subsequent to 1989, and on the issue of due process. The court rejected the

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[3] In particular, the application of R.C. 3770.072, 5747.02 and 5747.062.

trial court's analysis of the Commerce Clause issue, and found the issues regarding breach and impairment of contract moot. Additionally, on appellants' cross-appeal, the court affirmed the trial court, finding that the "inclusion of the Ohio lottery prize payment received in March 1989 constituted a retroactive application of Ohio's income tax on nonresident lottery winners."

The cause is now before the court pursuant to the allowance of a discretionary appeal.

OPINION, PER ROBIE RESNICK, J.

ALICE ROBIE RESNICK, J. The only issues before the court are whether the relevant portions of Am.Sub.H.B. No. 111, as applied to nonresident lottery winners under the facts of this case, violate due process, interfere with interstate commerce, or constitute unlawful retroactive legislation.[4]

I

The court of appeals determined that Am.Sub.H.B. No. 111, as applied in this case, violates due process because Ohio lacked a sufficient nexus with Couchot to exercise the authority to tax his lottery winnings. The court determined that while Ohio would have had the constitutional authority to tax Couchot on his lottery winnings in 1988 when he entered Ohio to redeem his lottery ticket, it cannot do so at a later time without "some new significant contact." The court of appeals reasoned that to do so would constitute retroactive application of the

[4] Appellees in their brief to the court raise two propositions of law that are unrelated to these issues. These relate to the status of the law prior to the enactment of Am.Sub.H.B. No. 111 and propose that Am.Sub.H.B. No. 111 "changed" rather than "clarified" preexisting law. Since, for purposes of this appeal, we assume that Am.Sub.H.B. No. 111 represents a change of law, see fn. 1, these propositions become irrelevant as a separate issue.

law. Further, the court found no contacts to exist after 1988. The court analogized the right to annual lottery payments "to the rights of an individual who purchases an annuity or earns a pension. * * * The state becomes the debtor and plaintiffs the creditors under the 'contract,'" and the "tax situs for a debt is in the domicile of the owner, the creditor."[5]

The question of the state's power to tax cannot be solved by freezing moments in time and transposing judicial statements of result from other cases. Such rigid and mechanical analysis cannot find a home in the Due Process Clause. The "tax situs for a debt" and, as argued by appellants, the "source of income" are not rules to be rigidly applied across the board, but are convenient ways to mark the presence or absence of state power under the circumstances of the cases from which they derive. As Justice Frankfurter so aptly explained in *Wisconsin v. J.C. Penney Co.* (1940), 311 U.S. 435, 444-445, 61 S.Ct. 246, 250, 85 L.Ed. 267, 270-271:

"Constitutional provisions are often so glossed over with commentary that imperceptibly we tend to construe the commentary rather than the text. We cannot, however, be too often reminded that the limits on otherwise autonomous powers of the states are those in the Constitution and not verbal weapons imported into it. 'Taxable event,' 'jurisdiction to tax,' 'business situs,' 'extraterritoriality,' are all compendious ways of implying the impotence of

[5] This portion of the court of appeals' analysis implicitly recognizes the doctrine of *mobilia sequuntur personam* (movables follow the person) and its corollary that income from intangibles is taxable by the state of the owner's residence. Under this doctrine, income from intangible property will be levied upon a nonresident only if the intangible property is used in a business in the taxing state or has acquired a "business situs" there. This doctrine has little overall value in determining the taxing power of a state beyond the narrow circumstances to which it has been applied. See the discussion below. Accordingly, there is no need in this case to determine the status of a lottery or a lottery ticket in this regard.

state power because state power has nothing on which to operate. These tags are not instruments of adjudication but statements of result in applying the sole constitutional test for a case like the present one. That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.

"* * * We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstance which they profess to summarize."

Little would be gained by a case-by-case review of the decisions of the United States Supreme Court in this area. As the Supreme Court candidly explained in *Miller Bros. Co. v. Maryland* (1954), 347 U.S. 340, 344-345, 74 S.Ct. 535, 538-539, 98 L.Ed. 744, 748:

"Despite the increasing frequency with which the question arises, little constructive discussion can be found in responsible commentary as to the grounds on which to rest a state's power to reach extraterritorial transactions or nonresidents with tax liabilities. Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law. But the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

The determination of state taxing power generally involves the flexible application of several factors, such as the state's power, dominion, or control over that which it seeks to tax; the benefits, protections, and opportunities afforded by the state; and the social and governmental costs incurred by the state. In turn, these factors will play out differently depending upon the nature of the tax imposed and the activities of the taxpayer or tax-generating source. *Miller Brothers, supra; Greenough v. Tax Assessors of Newport* (1947), 331 U.S. 486, 67 S.Ct. 1400, 91 L.Ed. 1621; *Internatl. Harvester Co. v. Wisconsin Dept. of Taxation* (1944), 322 U.S. 435, 64 S.Ct. 1060, 88 L.Ed. 1373; *State Tax Comm. of Utah v. Aldrich* (1942), 316 U.S. 174, 62 S.Ct. 1008, 86 L.Ed. 1358; *Graves v. Schmidlapp* (1942), 315 U.S. 657, 62 S.Ct. 870, 86 L.Ed. 1097; *Wisconsin v. J.C. Penney Co., supra; Curry v. McCanless* (1939), 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339; *New York ex rel. Whitney v. Graves* (1937), 299 U.S. 366, 57 S.Ct. 237, 81 L.Ed. 285; *Travis v. Yale & Towne Mfg. Co.* (1920), 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460; *Shaffer v. Carter* (1920), 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 445. See, also, *Stark v. Comptroller of Treasury* (1989), 78 Md.App. 599, 554 A.2d 458 (income tax on lottery winnings by nonresident held constitutional under circumstances similar to the case *sub judice*); Hellerstein & Hellerstein, State Taxation (2 Ed.1992) 6-6, Section 6-03, and 20-15, Section 20.05.

In the *Internatl. Harvester* case, the United States Supreme Court summarized the law by stating that "[a] state may tax such part of the income of a nonresident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers." *Id.*, 322 U.S. at 441-442, 64 S.Ct. at 1064, 88 L.Ed. at 1379.

It is difficult to imagine a more fundamental exertion of a state's taxing power than where the state taxes income on winnings from its lottery. The income received by Couchot in this case arose by virtue of his participation in the Ohio lottery. The Ohio lottery is an event exclusively within the power, dominion, and control of Ohio. See R.C. Chapter 3770. It is operated by Ohio's State Lottery Commision and subject to Ohio regulation. The benefits, protections, and opportunities afforded by Ohio in this regard are undeniable. Only Ohio can generate, collect, and distribute the funds comprised by its lottery. Only Ohio can provide for the existence of its lottery, and only Ohio can provide for and enforce the mechanisms for its operation. Also, the maintenance of the State Lottery Commission and the vast machinery employed, both literally and figuratively, by the state in the operation of the lottery, as well as the implementation of the rules and regulations surrounding it, are but part of the social and governmental costs incurred by Ohio in generating the income of which Couchot is the fortunate beneficiary. Certainly, the state of Ohio has given something for which it can ask return.

Accordingly, we hold that no violation of Due Process under the United States or Ohio Constitutions occurs by virtue of the application of the relevant portions of Am. Sub.H.B. No. 111 to Couchot's Ohio lottery winnings under the facts of this case. Thus, the judgment of the court of appeals is reversed as to this issue.

II

Appellees also contend that there is an insufficient nexus under the Commerce Clause to permit Ohio to tax Couchot's lottery winnings. The crux of their argument is that the United States Supreme Court, in *Quill Corp. v. North Dakota* (1992), 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91, recognizes a requirement of physical presence as a means to limit state burdens on interstate commerce. Thus, Ohio cannot constitutionally impose an

income tax on Couchot's lottery winnings because Couchot has not been physically present in Ohio since January 1, 1989.

As a preliminary matter, appellants argue that the Commerce Clause issue is not properly before the court because appellees failed to file a cross-appeal. However, appellees received the judgment they sought in the court of appeals. Consequently, there was nothing for them to appeal. Appeals are from judgments, not the opinions explaining them. R.C. 2505.03. Moreover, S.Ct.Prac.R. VI(2) states that an appellee shall file a brief "answering the appellant's contentions, and making any other appropriate contentions as reasons for affirmance of the order or judgment from which the appeal is taken." Similarly, R.C. 2505.22 provides that "assignments of error may be filed by an appellee who does not appeal, which assignments shall be passed upon by a reviewing court before the final order, judgment or decree is reversed in whole or in part."

Appellants rely upon *Christian Church of Ohio v. Limbach* (1990), 53 Ohio St.3d 270, 271, 560 N.E.2d 199, 200, fn. 1, as authority for the proposition that a cross-appeal is necessary. Their reliance is misplaced. In that case, the issue under discussion was abandoned by appellee on appeal to the court. On the other hand, the court has several times allowed appellees to defend judgments on the basis of issues not raised by appellant, without having to file a cross-appeal. Cf. *Tracy v. Merrell Dow Pharmaceuticals, Inc.* (1991), 58 Ohio St.3d 147, 152, 569 N.E.2d 875, 880, fn. 1; *Morgan v. Cincinnati* (1986), 25 Ohio St.3d 285, 290, 25 OBR 337, 341, 496 N.E.2d 468, 472-473; *Parton v. Weilnau* (1959), 169 Ohio St. 145, 171, 8 O.O.2d 134, 148, 158 N.E.2d 719, 730.

While proposition of law four in appellees' brief was not designated as being presented pursuant to R.C. 2505.22, an argument relative to the Commerce Clause

was put forth. Thus, we find the Commerce Clause issue to be properly before the court and therefore proceed to the merits.

Appellees have not cited any authority for their implied proposition that the purchase of an Ohio lottery ticket by a nonresident constitutes interstate commerce. However, in *Champion v. Ames* (1903), 188 U.S. 321, 23 S.Ct. 321, 47 L.Ed. 492, at the syllabus, the United States Supreme Court held that "[l]ottery tickets are subjects of traffic among those who choose to buy and sell them and their carriage by independent carriers from one State to another is therefore interstate commerce which Congress may prohibit under its power to regulate commerce among the several states." But, see, *Francis v. United States* (1903), 188 U.S. 375, 377, 23 S.Ct. 334, 335, 47 L.Ed. 508, 510. See, also, *United States Dept. of Treasury v. Fabe* (1992), 508 U.S. ——, ——, 113 S.Ct. 2202, 2207, 124 L.Ed.2d 449, 458.

Had appellees cited *Champion*, the argument would no doubt have been made that "the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well. [It] prohibits certain state actions that interfere with interstate commerce." *Quill Corp., supra*, 504 U.S. at 309, 112 S.Ct. at 1911, 119 L.Ed.2d at 104. Thus, Ohio cannot impose a tax upon lottery winnings in a way that unduly burdens interstate commerce.

The argument would then have continued from the point where appellees began. The Commerce Clause operates differently upon state taxing powers than does the Due Process Clause. "[T]he 'substantial-nexus' requirement is not, like due process' 'minimum-contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce. Accordingly, * * * a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." *Id.*, 504 U.S. at 313,

112 S.Ct. at 1913-1914, 119 L.Ed.2d at 107. In particular, as urged by appellees, the Commerce Clause requires the physical presence of the taxpayer.

Even if, by some strained combination of *Champion* and *Quill, supra*, it could be said that the Commerce Clause operates to limit the burdens that a state may place upon its own lottery with regard to nonresidents, it would still not operate as an impediment to Ohio's taxation of Couchot.

The Supreme Court in *Quill* reaffirmed the physical-presence requirement as to sales and use taxes. The court pointed out that "concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement." *Id.*, 504 U.S. at 317, 112 S.Ct. at 1916, 119 L.Ed.2d at 110. There is no indication in *Quill* that the Supreme Court will extend the physical-presence requirement to cases involving taxation measured by income derived from the state. Hellerstein & Hellerstein, State Taxation, *supra*, S6-3 to S6-4, 1994 Supp. Section 6.08[1]. Thus, the physical-presence requirement of *Quill* is not applicable to the case *sub judice*. See *Geoffrey, Inc. v. South Carolina Tax Comm.* (1993), 313 S.C. 15, 23, 437 S.E.2d 13, 18, fn. 4.

Moreover, the physical presence requirement would in any event have been satisfied. Couchot played the Ohio lottery. He purchased his winning ticket in Ironton and redeemed it in Columbus. The entire income received by Couchot, albeit paid over time in installments, is directly related to his physical presence in Ohio. Under this circumstance, we perceive no requirement that physical presence and actual receipt of income correspond in time, and appellees have presented no such authority.

Accordingly, we hold that the application of Am.Sub. H.B. No. 111 to Couchot's lottery winnings under the facts of this case is not violative of Clause 3, Section 8, Article I of the United States Constitution. We therefore reject appellees' contention in this regard.

III

On the issue of retroactivity, the court of appeals held as follows:

"However, redemption of the lottery ticket was a one-time act which occurred in March 1988, at which time Ohio law provided that lottery winnings of nonresidents were not subject to the Ohio income tax. Since that time, plaintiffs have had no contact of any kind with Ohio, except to receive in Kentucky the checks representing the installment payments of their 1988 lottery winnings.

"Accordingly, plaintiffs' 1988 act of redeeming the lottery ticket is not a contact permitting imposition of an income tax upon the 1990 installment payment. This constitutes retroactive application of the law by subjecting plaintiffs to the Ohio income tax based upon their 1988 act of redeeming the lottery ticket since they have had no further contact with Ohio. There is no event or transaction occurring in Ohio in 1989 or 1990 entitling Ohio to impose an income tax upon plaintiffs' 1988 lottery winnings payable in installments over twenty years. Since, being nonresidents, plaintiffs' 1988 lottery winnings were not subject to the Ohio income tax at that time, the winnings cannot be made subject to the Ohio income tax by subsequent enactment in the absence of some new significant contact of plaintiffs with Ohio merely because the winnings are being paid in installments. Given the facts of this case, imposition of Ohio's income tax on plaintiffs would be violative of the Due Process Clause of the United States Constitution and would constitute a retroactive law in violation of the Ohio Constitution."

This analysis inappropriately commingles the issue of due process and retroactivity, as well as certain aspects of the law relative to the retroactivity issue.[6]

[6] It is worthwhile to note that the obfuscation that occurred by virtue of the court of appeals' commingling of the due process and retroactivity issues is a matter apart from the federal decisions

To trigger a state's taxing power over a nonresident there must be a connection between the state and what it seeks to tax, created in part by the event or transaction that generated the gain. In this case, Ohio has the power to tax Couchot's lottery winnings because of his participation in the Ohio lottery. This is the benchmark of the due process inquiry.

On the other hand, the taxable event upon which R.C. Chapter 5747 levies a tax is the receipt of income. *Dery v. Lindley* (1979), 57 Ohio St.2d 5, 7, 11 O.O.3d 70, 71, 385 N.E.2d 291, 292. A state, having the power to tax by virtue of the circumstance from which the income is derived, may choose the time the income is received as the incidence and measurement of the tax. See *Chope v. Collins* (1976), 48 Ohio St.2d 297, 302-303, 2 O.O.3d 442, 445, 358 N.E.2d 573, 577; *Internatl. Harvester, supra,* 322 U.S. at 445, 64 S.Ct. at 1065, 88 L.Ed. at 1381.

What seems to have particularly disturbed the court of appeals is the fact that the General Assembly decided to tax lottery winnings of nonresidents after Couchot had already won the lottery. However, Couchot's winning of the lottery in 1988 was not a closed transaction, wholly completed at that time. Accordingly, the application of amended R.C. 5747.02 to his subsequent receipt of installment winnings does not result in new obligations respecting transactions already completed, and, thus, no question of retroactivity is involved. See *Herrick v. Lindley* (1979), 59 Ohio St.2d 22, 25, 13 O.O.3d 13, 15, 391 N.E.2d 729, 732; *Dery, supra,* 57 Ohio St.2d at 7, 11 O.O.3d at 71, 385 N.E.2d at 292; *Chope, supra,* 48 Ohio St.2d

which have permitted tax statutes that retroactively tax closed transactions of prior years to exist within the bounds of the Due Process Clause. See, *e.g., Welch v. Henry* (1938), 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87. See, also, *Lakengren, Inc. v. Kosydar* (1975), 44 Ohio St.2d 199, 73 O.O.2d 502, 339 N.E.2d 814 (rejecting the federal cases in this area).

at 301, 2 O.O.3d at 445, 358 N.E.2d at 576; *Lakengren v. Kosydar* (1975), 44 Ohio St.2d 199, 203-204, 73 O.O.2d 502, 504, 339 N.E.2d 814, 817. See, also, *Internatl. Harvester, supra,* 322 U.S. at 445, 64 S.Ct. at 1065, 88 L.Ed. at 1381.

As regards Couchot's 1989 installment payment, since the 1989 tax year was still open when the amendment to R.C. 5747.02 by Am.Sub.H.B. No. 111 became effective, amended R.C. 5747.02 can be constitutionally applied to the lottery winnings received by Couchot in that year. *Burke Internatl. Research Corp. v. Lindley* (1979), 58 Ohio St.2d 27, 12 O.O.3d 15, 387 N.E.2d 1227.

Accordingly, we hold that R.C. 5747.02 as amended effective July 1, 1989, by Am.Sub.H.B. No. 111, by which an annual income tax is levied "on every individual and estate earning or receiving lottery winnings, prizes or awards," is not unconstitutional as a retroactive law prohibited by Section 28, Article II of the Ohio Constitution or R.C. 1.58, as applied to a nonresident taxpayer receiving annual payments on Ohio lottery winnings in tax years 1989 and thereafter, even though the taxpayer won the lottery in a year prior to 1989. Thus, the judgment of the court of appeals is reversed as to this issue.

In light of the foregoing, the judgment of the court of appeals is reversed.

Judgment reversed

MOYER, C.J., DOUGLAS, WRIGHT, F.E. SWEENEY, PFEIFER and COOK, JJ., concur.

APPENDIX B

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 93APE09-1337
(Regular Calendar)

RICHARD L. COUCHOT *et al.*,
Plaintiffs-Appellants,
(Cross-Appellees),

v.

THE STATE LOTTERY COMMISSION *et al.*,
Defendants-Appellees,
(Cross-Appellants).

OPINION

Rendered on June 30, 1994

Appeal from the Franklin County Court of
Common Pleas

WHITESIDE, P.J.

Plaintiffs, Richard and Katharine Couchot, appeal from a judgment of the Franklin County Court of Common Pleas entering partial judgment in favor of defendants, The State Lottery Commission et al. Plaintiffs present the following seven assignments of error:

"1. The Court of Common Pleas erred as a matter of law in holding that, by purchasing a lottery ticket from The State Lottery Commission, an agency of the State of Ohio, Mr. Couchot entered into a contract with The State Lottery Commission, rather than the State of Ohio. By purchasing his lottery ticket, Mr. Couchot entered into a contract with the State of Ohio (Decision at 5-6.)

"2. The Court of Common Pleas erred as a matter of law in holding that the State of Ohio did not breach its contract with Mr. Couchot when it enacted Amended Substitute House Bill Number 111 (118th General Assembly) (effective July 1, 1989) ('Am Sub. H.B. 111') to amend Ohio's personal income tax statutes to impose the Ohio personal income tax on the lottery winnings of nonresidents, such as Mr. Couchot, who purchased lottery tickets before the enactment of Am. Sub. H.B. 111. (Decision at 5-6.)

"3. The Court of Common Pleas erred as a matter of law in holding that the State of Ohio did not breach its contract with Mr. Couchot when it attempted to and did collect Ohio personal income tax from Mr. Couchot by, *inter alia,* withholding such tax from Mr. Couchot's lottery prize winnings or requiring Mr. Couchot to pay Ohio personal income tax on such winnings. (Decision at 5-6.)

"4. The Court of Common Pleas erred as a matter of law in holding that the State of Ohio did not unconstitutionally impair its contract with Mr. Couchot when it enacted Am. Sub. H.B. 111. (Decision at 6-9.)

"5. The Court of Common Pleas erred as a matter of law in holding that the State of Ohio did not unconstitutionally impair its contract with Mr. Couchot when it attempted to and did collect Ohio

personal income tax from Mr. Couchot by, *inter alia,* withholding such tax from Mr. Couchot's lottery prize winnings or requiring Mr. Couchot to pay Ohio personal income tax on such winnings. (Decision at 6-9.)

"6. The Court of Common Pleas erred as a matter of law in holding that the State of Ohio did not violate Mr. Couchot's rights under the Commerce and Due Process Clauses of the United States Constitution and the Due Course of Law Clause of the Ohio Constitution when it enacted Am. Sub. H.B. 111. (Decision at 11-12.)

"7. The Court of Common Pleas erred as a matter of law in holding that the State of Ohio did not violate Mr. Couchot's rights under the Commerce and Due Process Clauses of the United States Constitution and the Due Course of Law Clause of the Ohio Constitution when it attempted to and did collect Ohio personal income tax from Mr. Couchot by, *inter alia,* withholding such tax from Mr. Couchot's lottery prize winnings or requiring Mr. Couchot to pay Ohio personal income tax on such winnings. (Decision at 11-12.)"

Defendants filed a cross-appeal and present the following assignment of error:

"The trial court erred in holding that the inclusion of the Ohio lottery prize payment received in March, 1989, in plaintiffs' Ohio taxable income for the 1989 tax year constituted a retrospective application of the law in violation of Section 28, Article II of the Ohio Constitution and R.C. 1.58."

On March 2, 1988, Richard L. Couchot ("plaintiff"), a resident of Kentucky, purchased an Ohio super lotto ticket at the Anderson Party Center in Ironton, Ohio, which lottery ticket contained the winning numbers later

chosen by a representative of The State Lottery Commission ("State Lottery Commission"). Plaintiff's prize, which was claimed in the Columbus lottery office, was worth $21,000,000, payable in twenty equal annual installments of $1,050,000, less twenty percent withholding for federal income tax purposes. Plaintiff's first check arrived on March 22, 1988, for $840,000. Soon thereafter, plaintiff and his wife (hereinafter "plaintiffs"), relocated their primary residence from Kentucky to Florida.

On March 22, 1988, the date the state disbursed plaintiffs' first lottery payment, R.C. 5747.02 read in pertinent part: "There is hereby levied on every individual and every estate *residing in or earning or receiving income in this state an annual tax* * * *." (Emphasis added.) R.C. 5747.02 was amended effective July 1, 1989, by Am.Sub. H.B. No. 111. R.C. 5747.02 now reads in pertinent part:

> "* * * [T]here is hereby levied on every individual and every estate residing in or earning or receiving income in this state, *and on every individual and estate earning or receiving lottery winnings, prizes or awards* pursuant to Chapter 3770. of the Revised Code, an annual tax * * *."[1] (Emphasis added.)

When plaintiffs received their 1990 annual lottery disbursement, the State Lottery Commission withheld $36,750 for Ohio tax purposes, pursuant to R.C. 5747.062 and R.C. 3770.072.[2] Plaintiffs protested to lottery officials concerning the withholding but to no avail.

On May 2, 1990, plaintiffs filed a complaint (amended July 3, 1990), in the Franklin County Court of Common

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[1] R.C. 5747.02 was amended in 1991 and 1992, but those amendments did not affect the language presented here and, therefore, are not pertinent to this matter.

[2] R.C. 5747.062 and R.C. 3770.072 mandate, effective January 1, 1990, that the State Lottery Commission withhold 3.5 percent of each lottery-award payment for Ohio income tax purposes.

Pleas for declaratory judgment, permanent injunction and recovery of taxes. Plaintiffs alleged the Ohio income tax, as applied to them, violated the Ohio and United States Constitutions and constituted breach of contract. Plaintiffs also moved for an injunction against the state of Ohio to stop the deduction and withholding from their lottery disbursement of Ohio income tax.

Defendant State Lottery Commission filed a motion to dismiss on the ground that the action was one for monetary damages against the state and, therefore, must be filed in the Court of Claims. Defendants argued that the Franklin County Court of Common Pleas lacked jurisdiction to proceed.

The trial court agreed with defendants' argument and granted their motion to dismiss, holding it lacked jurisdiction to proceed on the matter. From this dismissal, plaintiffs filed a timely appeal.

The matter was heard by this court and, in *Couchot v. Ohio State Lottery Comm.* (1991), 71 Ohio App.3d 371, this court held at 374:

> "* * * [T]he court of common pleas did have subject matter jurisdiction, at least to the degree that it may rule on the constitutionality of R.C. 5747.02, as applied to appellants, as a basis for the action under R.C. 2723.01 * * *."

The case was remanded to the trial court for further proceedings consistent with law and this court's opinion in *Couchot*.

The parties, upon remand, entered into stipulations as to the evidence, extensively briefed the issues, and submitted the matter to the trial court. The trial court rendered a decision, finding for defendants in all respects with the exception of the claim that imposition of the Ohio income tax to lottery-prize-award payments received prior to July 1, 1989, was a retroactive application of

R.C. 5747.02 in violation of Section 28, Article II, of the Ohio Constitution. The trial court entered its judgment entry, from which plaintiffs filed a timely appeal. Defendants filed a cross-appeal.

Plaintiffs contend in their sixth and seventh assignments of error that the trial court erred in holding that the enactment of Am.Sub.H.B. No. 111, the withholding of Ohio personal income tax from plaintiffs' lottery prize distribution check and subsequent collection of such tax from plaintiffs,[3] did not violate plaintiffs' federal and state constitutional rights.

Defendants, in their sole assignment of error raised in their cross-appeal, contend that the trial court erred in holding that the inclusion of the Ohio lottery prize payment received in March 1989 in plaintiffs' Ohio taxable income for the 1989 tax year constituted a retroactive application of the law in violation of Section 28, Article II, of the Ohio Constitution. Defendants' arguments are premised in part on their contention that nonresidents were subject to Ohio income tax on lottery winnings earned or received prior to July 1, 1989, and, therefore, Am.Sub.H.B. No. 111 imposed no new obligations on nonresident Ohio lottery winners. A review of the Ohio income tax as it was in effect prior to July 1, 1989, reveals defendants' contentions are incorrect since nonresident lottery winners were not subject to Ohio income tax on their awards[4] at least prior to the 1989 amendment to R.C. 5747.02.

Prior to July 1, 1989, former R.C. 5747.02 imposed Ohio income tax on "every individual and every estate

[3] The trial court also held inclusion of plaintiffs' lottery winnings prior to July 1989 constituted a retroactive application of Am.Sub. H.B. No. 111 in violation of the Ohio Constitution.

[4] See *Couchot, supra,* at 372, where this court states: "At the time, Ohio law did not provide for assessment of income tax on lottery winnings of non-residents." Since this statement may be dicta, a more complete analysis is appropriate at this time.

residing in or *earning* or *receiving* income *in this state.*" (Emphasis added.) There is no contention that plaintiffs ever resided or owned property in the state of Ohio. (See Couchot deposition, at pp. 5-8.) Pursuant to former R.C. 5747.02, as in effect prior to July 1, 1989, the state of Ohio taxed lottery winnings only if the monies were "earned" or "received" in Ohio.

In general, the purchase and sale of lottery tickets is governed by the principles of contract law. See *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296 (issue conceded); *Carson v. Ohio Lottery Comm.* (March 11, 1980), Franklin App. No. 79AP-558, unreported (1980 Opinions 633), and Annotation (1985), 40 A.L.R.4th 663. Simply stated, the state of Ohio "agrees" to pay the holder of a lottery ticket containing the winning numbers as chosen by the State Lottery Commission, the "jackpot" amount in yearly installments.[5] It is this promise which induces the purchase of the lottery tickets. A creditor-debtor relationship is created.[6] The state becomes the "debtor/payor" and the lottery winner becomes the "creditor/payee." It is well-established that the tax situs for a debt (intangible personal property) is the domicile of the owner, the creditor. As noted in *Farmers' Loan & Trust Co. v. Minnesota* (1929), 280 U.S. 204, 213; 50 S.Ct. 98, 101, quoting *Cleveland, Painesville & Ashtabula Railroad Co. v. Pennsylvania,* 15 Wall. 300, 320; 21 L.Ed. 179:

> " 'But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors.

[5] A lottery winner may now elect at the time of purchase to collect winnings in a lump sum. The lump sum option was not available on March 2, 1988.

[6] The relationship is similar to that created by the purchase of an annuity with identical payment provisions, that is, payment of a fixed sum annually for a fixed number of years.

> With them they are property, and in their hands they may be taxed. * * *' "

Therefore, the lottery payment, once received, has a tax situs in the hands of the recipient. For the payment to be taxable under R.C. 5747.02, as it previously read, the payment must have been *received* in Ohio. R.C. 1.42 requires words and phrases to be construed according to common usage.

"Receive" is defined in the Random House Dictionary of the English Language (2 Ed. 1987) Unabridged, 1610, as follows:

> "1. to take into one's possession (something offered or delivered): *to receive many gifts* * * * 3. to have delivered or brought to one: * * *." (emphasis *sic*.)

The record reflects plaintiffs' lottery check was sent to Kentucky. The record does not reflect that plaintiffs have ever received any of their lottery winnings in Ohio. To find plaintiffs "received" their winnings in Ohio, under the facts of this case, would be to ignore the well-established principle that a debt possesses value only in the hands of the creditor, and has taxable situs in the hands of the creditor.

Statutes are presumed to be in compliance with state constitutions and the United States Constitution pursuant to R.C. 1.47, which provides that: "In enacting a statute, it is presumed that: (A) Compliance with the constitutions of the state and of the United States is intended; * * *." To find plaintiffs "received" their lottery winnings in the state of Ohio when the record shows that no checks were ever received in Ohio would be to interpret "receive" as used in R.C. 5747.02 in a manner inconsistent with R.C. 1.47.[7] Plaintiffs have never received

[7] The legislature in Am.Sub.H.B. No. 111 amending various provisions of R.C. Chapter 5747 implicitly recognized that lottery winnings of nonresidents of Ohio were not subject to the Ohio income tax prior to July 1, 1989.

their lottery winnings in Ohio. Former R.C. 5747.02 imposed a tax only upon income earned or received in Ohio. Plaintiffs did not receive lottery proceeds in Ohio.

The remaining question is whether plaintiff's lottery proceeds were "earned" in the state of Ohio. Income was defined by R.C. 5747.01 as either "business income" or "nonbusiness income." "Business income" was defined by former R.C. 5747.01(B), as:

> "* * * income arising from transactions, activities, and sources in the regular course of a trade or business and includes income from tangible and intangible property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation."

The evidence does not suggest plaintiff's lottery proceeds were won in the regular course of a trade or business. In fact, the record reflects the winning lottery ticket was only the third Ohio lottery ticket ever purchased by plaintiff Richard Couchot. (Couchot deposition, p. 10.)

Since the lottery winnings are not business income, such winnings must constitute nonbusiness income,[8] which was defined in former R.C. 5747.01(C) as:

> "* * * all income other than business income and may include, but is not limited to compensation, rents and royalties from real or tangible personal property, capital gains, interest, dividends *and distributions*, or patent or copyright royalties." (Emphasis added.)

In 1988, the tax situs of nonbusiness income of nonresidents of the state was governed by former R.C. 5747.20(B), which read in pertinent part:

[8] The legislature by Am.Sub.H.B. No. 111 specifically designated lottery winnings as nonbusiness income by amending R.C. 5747.01 and 5747.20, effective July 1, 1989.

> "*All items of nonbusiness income* or deduction taken into account in the computation of adjusted gross income for the taxable year *by a nonresident shall be allocated* to this state *as follows*: * * *
>
> "* * *
>
> "(5) *An item of income* or deduction which has been taken into account in the computation of adjusted gross income for the taxable year by a nonresident and which is *not otherwise specifically allocated or apportioned* pursuant to Sections 5747.20 to 5747.23 of the Revised Code, including without limitation, interest, dividends and distributions * * * *shall not be allocated to this state unless the taxpayer has his domicile in this state at the time* such income was *paid or accrued.*" (Emphasis added.)

As discussed, *supra,* plaintiffs never had their domicile in the state of Ohio. A review of former R.C. Chapter 5747 and particularly former R.C. 5747.20 to 5747.23, does not reveal a specific provision for allocation of lottery-prize awards. Therefore, the plain language of former R.C. 5747.20(B) provides that nonresident lottery winners not receiving payments in Ohio were not subject to Ohio income tax prior to July 1, 1989, the effective date of Am.Sub.H.B. No. 111. R.C. 5747.20 (B) also was amended by Am.Sub.H.B. No. 111 by changing R.C. 5747.20(B)(5) to provide, effective July 1, 1989, that "all lottery prize awards paid by the State Lottery Commission * * * shall be allocated to this state."

Defendants argue that, even if Am.Sub.H.B. No. 111 levied Ohio income tax on nonresident lottery winners for the first time, imposition of the tax on plaintiffs was not unconstitutionally retroactive as it was enacted prior to the close of the taxable year and applied only to income earned or received during that year. Retroactive laws are prohibited by Section 28, Article II, of the Ohio Constitution, which provides: "The General Assembly shall have no power to pass retroactive laws, or

laws impairing the obligation of contracts." As noted in *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, paragraph one of the syllabus:

> "The issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the General Assembly specified that the statute so apply. Upon its face, R.C. 1.48 establishes a threshold analysis which must be utilized prior to inquiry under Section 28, Article II, of the Ohio Constitution. * * *" (Citation omitted.)

R.C. 1.48 provides that: "A statute is presumed to be prospective in its operation unless expressly made retrospective." The plain language of neither amended R.C. 5747.02 nor amended R.C. 5747.20 evidences an intent by the General Assembly to apply the statute retrospectively. The language in amended R.C. 5747.02 "earning or receiving lottery winnings, prizes, or awards" speaks of current or future income, rather than past income. Likewise, the language of amended R.C. 5747.20 as to allocation of lottery-prize awards speaks of current or future awards and payments, not past awards, even if still being paid.

The issue then is whether the tax can be constitutionally imposed on nonresident lottery winners who have won their prize prior to July 1, 1989, but continue to receive disbursements after the effective date of Am.Sub. H.B. No. 111. Due process requires that a state have a sufficient "nexus" with an individual prior to exercising the authority to tax that individual. As explained by the United States Supreme Court in *Quill Corp.* v. *North Dakota By and Through Heitkamp* (1992), 112 S.Ct. 1904, at 1913:

> "Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires

> that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified 'notice' or 'fair warning' as the analytic touchstone of due process nexus analysis. In contrast, the Commerce Clause, and its nexus requirement, are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. * * *"

In assessing the constitutionality of amended R.C. 5747.02,[9] the trial court utilized a "commerce clause" analysis. As explained in *Quill Corp.*, at 1913, the nexus requirement of the two clauses are distinct and are "animated by different constitutional concerns and policies." The trial court erred in utilizing the commerce clause to determine the statute's constitutionality as applied to plaintiffs.

The sole contact plaintiffs have with the state of Ohio is that they are entitled to receive annual lottery payments from the state for approximately fourteen more years. When plaintiffs submitted their lottery ticket in compliance with lottery rules and regulations and claimed their prize, they became entitled to the $21,000,000 jackpot payable over twenty years in equal installments. Their right to the payments are analogous to the rights of an individual who purchases an annuity or earns a pension. The right to receive the payments fully matures at the time the annuity is purchased or the pension vests. While distribution of the proceeds may occur over time, the right to payment occurs when the contract is formed. After a lottery winner claims his prize, the state of Ohio is bound to pay his award. The state becomes the debtor and plaintiffs the creditors under the "contract."

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[9] The trial court did not construe either former or present R.C. 5747.20.

As noted, *supra*, the tax situs for a debt is in the domicile of the owner, the creditor. As plaintiffs' domicile is in Florida and previously Kentucky (where the payments are apparently still actually sent and deposited), the state of Ohio must have some other substantial connection with plaintiffs in order to have the authority to impose a tax upon the lottery-installment payments.

The only contact Ohio has with plaintiffs is that Ohio is obligated to pay them their lottery-winning installments for the balance of the twenty years. The evidence reveals that plaintiffs have no other contacts or connections with Ohio. As noted in *Asahi Metal Industry Co. v. Superior Ct. of California, Solano Cty.* (1987), 480 U.S. 102, 108; 107 S.Ct. 1026, 1030, quoting *McGee v. International Life Ins. Co.* (1957), 355 U.S. 220, 78 S.Ct. 199:

> "'Jurisdiction is proper * * * where the contacts proximately result from actions by the defendant himself that create a "substantial connection" with the Forum State.'" (Emphasis *sic.*)

While plaintiffs purchased a lottery ticket and claimed their prize award in the state of Ohio in 1988, the record does not reflect any other actions by plaintiffs that create a connection to Ohio. The debt itself has situs in the domicile of the owner (Florida or Kentucky); therefore, the property sought to be taxed is not in Ohio. Plaintiffs individually have no contacts with Ohio. *International Harvester Co. v. Wisconsin Dept. of Taxation* (1944), 322 U.S. 435, 441; 64 S.Ct. 1060, 1064, states that:

> "* * * A state may tax such part of the income of a nonresident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers. * * *"

The redeeming of an Ohio lottery ticket constitutes such an event or transaction permitting taxation of nonresident lottery winnings prospectively.

However, redemption of the lottery ticket was a one-time act which occurred in March 1988, at which time Ohio law provided that lottery winnings of nonresidents were not subject to the Ohio income tax. Since that time, plaintiffs have had no contact of any kind with Ohio, except to receive in Kentucky the checks representing the installment payments of their 1988 lottery winnings.

Accordingly, plaintiffs' 1988 act of redeeming the lottery ticket is not a contact permitting imposition of an income tax upon the 1990 installment payment. This constitutes retroactive application of the law by subjecting plaintiffs to the Ohio income tax based upon their 1988 act of redeeming the lottery ticket since they have had no further contact with Ohio. There is no event or transaction occurring in Ohio in 1989 or 1990 entitling Ohio to impose an income tax upon plaintiffs' 1988 lottery winnings payable in installments over twenty years. Since, being nonresidents, plaintiffs' 1988 lottery winnings were not subject to the Ohio income tax at that time, the winnings cannot be made subject to the Ohio income tax by subsequent enactment in the absence of some new significant contact of plaintiffs with Ohio merely because the winnings are being paid in installments. Given the facts of this case, imposition of Ohio's income tax on plaintiffs would be violative of the Due Process Clause of the United States Constitution and would constitute a retroactive law in violation of the Ohio Constitution.

However, R.C. 1.47 states that it is presumed that "[c]ompliance with the constitutions of the state and of the United States is intended." No intent of the General Assembly is indicated by the language of Am.Sub.H.B. No. 111 (amending R.C. 5747.02 and 5747.20), to apply Ohio's income tax retroactively on nonresident lottery winners. As the rules of construction require the statute

to be construed in a constitutional manner, R.C. 5747.02 and 5747.20 can only be construed to impose income tax on, and allocate, lottery prizes won (by nonresidents), after July 1, 1989.

Defendants' assignment of error alleged that the trial court erred in holding that inclusion of the Ohio lottery prize payment received in March 1989 constituted a retroactive application of Ohio's income tax on nonresident lottery winners. As the rules of construction require the statute to be construed in a constitutional manner, R.C. 5747.02 can only be constitutionally construed to impose Ohio income tax (on non-Ohio residents) on lottery prizes won after July 1, 1989. Likewise, amended R.C. 5747.20 must be construed to allocate to Ohio only lottery-prize awards won by nonresidents after July 1, 1989, since former R.C. 5747.20 provided that such lottery-prize-award payments to nonresidents would not be allocated to Ohio. Therefore, imposition of the income tax on the lottery winnings received by plaintiff did constitute a retroactive application of R.C. 5747.02, and defendant's sole assignment of error is not well-taken.

As to plaintiffs' assignments of error, to the extent the trial court found the withholding and imposition of Ohio income tax on plaintiff constitutional, the trial court erred. To the extent the trial court found imposition of Ohio income tax on lottery winnings distributed to plaintiffs prior to July 1, 1989, to be "retrospective" application of the tax, the trial court did not err. For the reasons discussed above, plaintiffs' sixth and seventh assignments of error are well-taken.

Plaintiffs' first, second, third, fourth and fifth assignments of error allege imposition of Ohio's income tax on plaintiffs constitutes breach of contract and unconstitutional impairment of contract under the Ohio and United States Constitutions. Due to this court's resolution of plaintiffs' sixth and seventh assignments of error and

defendant's sole assignment of error, plaintiffs' remaining assignments of error are moot. See App.R. 12.

For the foregoing reasons, plaintiffs' sixth and seventh assignments of error are sustained, defendant's assignment of error is overruled, and plaintiffs' remaining assignments of error are moot; the judgment of the Franklin County Court of Common Pleas is reversed; and this cause is remanded to that court with instructions to enter a declaratory judgment declaring Ohio's income tax is not applicable to plaintiffs, and for such further proceedings as may be in accordance with law, consistent with this opinion.

Judgment reversed and cause remanded with instructions.

CLOSE, J., concurs.

BRYANT, J., concurs in part, dissents in part.

BRYANT, J., concurring in part and dissenting in part.

Although I agree with the majority that under former R.C. 5747.02 the Ohio lottery winnings of nonresidents were not subject to Ohio income tax, I am unable to join the majority in holding that application of amended R.C. 5747.02 to plaintiffs' lottery winnings would "* * * be violative of the Due Process Clause of the United States Constitution and would constitute a retroactive law in violation of the Ohio Constitution." Thus, I respectfully dissent in part.

In addressing plaintiffs' sixth and seventh assignments of error, the majority concludes that because the "debt" arising out of plaintiffs' lottery contract with Ohio is intangible personal property, the income derived therefrom may only be taxed by the state of the property owner's domicile; that plaintiffs, the owners of this debt, are not domiciled in Ohio; and that as a result, Ohio may not tax the lottery winnings derived from this property.

R.C. 5747.02 imposes an income tax on the Ohio lottery winnings of nonresidents. The Due Process Clause of the Fourteenth Amendment requires that certain "minimum contacts" exist between a state and the person, property, or transaction which the state wishes to tax. *Miller Brothers Co. v. State of Maryland* (1954), 74 S.Ct. 535, 539; 347 U.S. 340, 344-345; *Quill Corp. v. North Dakota By and Through Heitkamp* (1992), 112 S.Ct. 1904. Hence, a state may impose an income tax upon those portions of a nonresident's income which are "* * * fairly attributable either to property located in the state or to events or transactions which occur there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits it confers." *International Harvester Co. v. Wisconsin Dept. of Taxation* (1944), 64 S.Ct. 1060, 1064; 322 U.S. 435.

The lottery proceeds which Ohio seeks to tax are directly "attributable" to the contract plaintiffs entered into with the state of Ohio when they purchased and subsequently redeemed their Ohio lottery ticket. Under this continuing contract plaintiffs receive the numerous benefits and protections afforded by the state of Ohio to contracting parties. In my view, this contract provides sufficient "minimum contacts" between plaintiffs and the state of Ohio to bring plaintiffs' lottery winnings within the taxing power of Ohio. See *Stark v. Comptroller of the Treasury* (Md.App. 1989), 554 A.2d 458 (Maryland income tax imposed on proceeds of Maryland state lottery won by residents of Washington, held not violative of due process).

The United States Supreme Court addressed similar circumstances in *New York ex rel. Whitney v. Graves* (1937), 57 S.Ct. 237, 299 U.S. 366, upholding an income tax imposed by the state of New York on profits realized by a nonresident on the sale of a "right appurtenant" to his membership on the New York Stock Exchange. Even though the stock exchange membership was

intangible personal property owned by an individual domiciled outside of New York, the court found no due process violation in subjecting the taxpayer to New York state taxes on the property. Similarly, I find no violation of the due process clause of the United States Constitution in applying R.C. 5747.02 to plaintiffs' winnings.

Accordingly, I would overrule plaintiffs' sixth and seventh assignments of error.

In addressing defendants' cross-appeal, the majority holds that application of amended R.C. 5747.02 to any part of plaintiffs' lottery winnings would violate the Ohio Constitution's prohibition against retroactive laws.

"The event triggering operation of the taxing power is *realization* of gain * * *." (Emphasis added.) *Chope v. Collins* (1976), 48 Ohio St.2d 297, 302. "Realization" occurs when an individual "* * * has control over the disposition of the proceeds of a transaction." *Dimino v. Dimino* (A.D. 1983), 459 N.Y.S.2d 164, 166. Here, plaintiffs did not gain control over the disposition of their entire lottery prize in 1988; rather, plaintiffs obtained control over only the first installment payment in that year. Similarly, in any subsequent year, plaintiffs will obtain control over the disposition of only that year's installment payment. Hence, application of amended R.C. 5747.02 to installments paid to plaintiffs after the effective date of this provision is not a retroactive application of the law but, rather, an " * * * appl[ication] of the law in existence at the time of the taxable transaction." *Id.*

Nor is the application of amended R.C. 5747.02 to the installment payment plaintiffs received in March of 1989 a retroactive application of the provision. In *Burke International v. Lindley* (1979), 58 Ohio St.2d 27, the Ohio Supreme Court held that:

> "The amendment to R.C. 5733.05, adopted effective December 20, 1971, by which the * * * basis for computing the corporate franchise tax [was changed] is not unconstitutional as a retroactive law * * * as applied to a corporate taxpayer whose accounting year was not yet closed at the time the amendment became effective." *Id.* at syllabus.

When the tax year is closed for a taxpayer, it is closed for the taxing authorities as well, and as a corollary, when a tax year is open for a taxpayer, it is open for the taxing authority as well. *Id.* at 29. Since plaintiffs' 1989 tax year was open on July 1, 1989, the effective date of amended R.C. 5747.02, that provision may constitutionally be applied to all income received in the 1989 tax year.

The majority, however, further states that the application of amended R.C. 5747.02 to any portion of plaintiffs' lottery proceeds would be unconstitutionally retroactive because plaintiffs' "minimum contacts" with Ohio, which the majority views as only plaintiffs' entries into Ohio to purchase and redeem their lottery ticket, occurred prior to the effective date of the statute. In my view, plaintiffs' minimum contacts with Ohio did not end with their redemption of their lottery ticket. Rather, under the rationale of *International Harvester, supra*, sufficient contact with Ohio exists in plaintiffs' ongoing contract with the state, pursuant to which plaintiffs continue to enjoy the substantial benefits and protections conferred on such agreements by the state.

More particularly, the Supreme Court in *International Harvester* addressed and rejected the argument propounded by the majority. *International Harvester* involved the Wisconsin Privilege Dividend Tax, Section 3, Chapter 505, Wisconsin Laws of 1935, as amended by Chapter 522, which was imposed by the state of Wisconsin on stock dividends paid by resident and nonresident corporations, to the extent that such dividends were paid out of corporate income derived from property located or business transacted in the state of Wisconsin. *Interna-*

tional Harvester, 64 S.Ct., at 1062. In that case, a New Jersey corporation challenged the application of the tax to dividends paid by the corporation to stockholders residing outside the state of Wisconsin; the corporation asserted that such an application of the tax was violative of the Due Process Clause and unconstitutionally retroactive.

The Supreme Court rejected the corporation's due process argument stating that " '* * * the incidence of the tax as well as its measure is tied to the earnings which the state of Wisconsin has made possible, * * * ' and both the earnings and their disposition are subject to state control and hence its power to tax." *International Harvester*, 64 S.Ct., at 1065. The corporation however argued that the tax was nonetheless unconstitutionally retroactive as applied to corporate income which was derived from business transacted in Wisconsin prior to the enactment of the statute. In effect, the corporation argued that, to the extent Wisconsin's "minimum contacts" with the taxpayer in the form of business transacted by the corporation in Wisconsin occurred prior to the enactment of the tax statute, application of the tax to income derived from such contacts was unconstitutionally retroactive. The court disagreed, stating that "* * * since the taxable event, the distribution of dividends paid from earnings, and the deduction of the tax from them occurred subsequent to the enactment of the taxing statute, no question of its retroactive application is involved." *Id.* Thus, the application of R.C. 5747.02 to lottery proceeds "realized" by plaintiffs during or after the year in which the provision took effect would not constitute a retroactive application of the provision. *Id.* Therefore, I would sustain defendants' sole assignment of error to the extent indicated.

Plaintiffs' first, second, third, fourth and fifth assignments of error are interrelated, and together raise the issue of whether the state of Ohio unconstitutionally impaired its lottery contract with plaintiffs by collecting

income tax from these winnings pursuant to amended R.C. 5747.02.

In *The North Missouri Railroad Co. v. Maguire* (1873), 87 U.S. 46, the United States Supreme Court explained that:

> "[T]he taxing power of the State is never presumed to be relinquished, and, consequently * * * it exists unless the intention to relinquish it is declared in clear and unambiguous terms * * *
>
> "* * *
>
> "Authorities from numerous sources are cited by the plaintiffs, but none of them show that a lawful tax on a new subject, or an increased tax on an old one, interferes with a contract or impairs its obligation, within the meaning of the Constitution, even though such taxation may affect particular contracts, as it may increase the debt of one person and lessen the security of another, or may impose additional burdens upon one class and release the burdens of another, still the tax must be paid unless prohibited by the Constitution, nor can it be said that it impairs the obligation of any existing contract in its true legal sense." *Id.* at 61.

At the time plaintiffs entered into the lottery contract with the state of Ohio, the law of Ohio was silent as to the taxation of Ohio lottery winnings won by nonresidents. Because this silence cannot be construed as clear and unambiguous declaration by the state of Ohio to relinquish its power to tax the Ohio Lottery winnings of nonresidents, *Stark, supra,* at 465, I would hold that the taxation of plaintiffs' lottery winnings was within the legitimate expectations of the parties and overrule plaintiffs' second, third, fourth and fifth assignments of error.

APPENDIX C

[Filed Aug. 10, 1993]

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Case No. 90CVH05-3330
JUDGE DAVID W. FAIS

RICHARD L. COUCHOT, *et al.*,
Plaintiff

vs.

THE STATE LOTTERY COMMISSION, *et al.*,
Defendants

DECISION

Rendered this 9th day of August, 1993.

FAIS, J.

This matter has been submitted to the Court for a decision upon the merits.

Plaintiffs set forth essentially four arguments. Specifically, Plaintiffs contend R.C. 5747.01 *et seq.*: (1) breaches two separate and material terms of the contract between the State and Mr. Couchot; (2) violates the Contract Clauses of the United States and Ohio Constitutions; (3) violates the prohibition against retroactive laws found in Art. II, Sec. 28, of the Ohio Constitution and R.C. 1.58; and (4) violates the Commerce and Due Process Clauses of the United States Constitution and the Due Course of Law Clause of the Ohio Constitution. Each argument shall be individually addressed below.

STATEMENT OF FACTS

On March 2, 1988, Richard L. Couchot, a resident of Ashland, Kentucky, purchased an Ohio Super Lotto ticket in Ironton, Ohio. That evening, the State Lottery Commission selected Mr. Couchot's six numbers as the winning combination of numbers. Mr. Couchot was the only winner and the Lottery Commission awarded him a total cash prize of $21,000,000, to be paid in twenty equal annual installments of $1,050.000.

On or about March 21, 1988, Mr. Couchot received his first check from the State of Ohio totaling $840,000 ($1,050,000 less $210,000 being withheld for Federal tax purposes.) On or about March 16, 1989 Mr. Couchot received the second of his twenty instaliments totaling $840,000.

In 1989, the General Assembly enacted Am. Sub. H.B. 111, which became effective July 1, 1989. In that bill, R.C. 5757.02 was amended to provide that every individual "earning or receiving lottery winnings, prizes or awards pursuant to Chapter 3770 of the Ohio Revised Code" would be subject to Ohio income tax on those "lottery winnings, prizes or awards." Effective January 1, 1990, pursuant to R.C. 3770.072 and R.C. 5747.062, the Ohio income tax was required to be deducted and withheld from all lottery prize payments.

In March, 1990, Mr. Couchot received $803,250, reflecting the $36,750 in Ohio income tax withheld in addition to the $210,000 already withheld for Federal income tax.

On April 16, 1990, Mr. and Mrs. Couchot filed, under protest, a joint Ohio income tax return for 1989, and paid $70,002.68 in Ohio income tax on the March 1989 installment they received.

In 1990, the Couchots supplemented the $36,750 withheld by the Lottery Commission from the March, 1990 installment by making quarterly estimated Ohio income tax payments of $15,825 on September 17, 1990 and $17,525 on December 30, 1990, for a total Ohio income tax payment in 1990 of $70,100.00. This amount represents the Ohio tax liability on the March, 1990 installment.

Plaintiffs have filed this suit seeking reimbursement of taxes and declaratory and injunctive relief.

JURISDICTION

The issue of whether this Court has subject matter jurisdiction over the Complaint herein has been addressed in *Couchot v. State Lottery Comm.* (1991), 71 Ohio App. 3d 371.

The appellate court stated this court "[does] have subject matter jurisdiction, at least to the degree that [we] may rule on the constitutionality of R.C. 5747.02, as applied to [Plaintiffs], as a basis for the action under R.C. 2723.01." *Id.* at 374.

Therefore, it is clear this Court has jurisdiction to determine the alleged constitutional violations. As to the breach of contract claim, as noted by the appellate court, there appears to be no specific prayer for relief that corresponds to this claim. Hence, no damages are being sought which would trigger jurisdiction in the Court of Claims.

Accordingly, to the extent Plaintiffs' breach of contract claim may be combined with the declaratory judgment counts, the Court shall address the merits of this count also.

Defendants have raised a secondary issue of jurisdiction asserting Plaintiffs have an adequate remedy at law by statutory appeal to the Board of Tax Appeals.

The appellate court, in discussing the appropriate relief which may be sought, stated this Court should review questions of constitutionality where deferring to the administrative agency would only prolong a decision because an administrative agency is without jurisdiction to determine constitutional issues. *Id.* at 375.

Therefore, Plaintiffs are not required to exhaust their administrative remedies prior to seeking relief under these

circumstances. The constitutional questions are properly before this Court.

Lastly, as to the jurisdiction of this Court to grant the required relief, this will be more fully developed later in the opinion.

STANDARD

The burden of proof required to be met by Plaintiffs is that the invalidity of the tax must be shown beyond a reasonable doubt. See *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142 and *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St. 3d 1.

Furthermore, legislative enactments are presumed to be constitutional and any doubt as to the constitutionality of the statute must be resolved in favor of its validity. See generally, R.C. 1.47 and *State ex rel. Doerfler v. Price* (1930), 101 Ohio St. 50. In order to declare a statute unconstitutional, the court must be convinced, beyond a reasonable doubt, that the legislation and Constitution are "clearly incompatible." See *Rocky River, supra.*

BREACH OF CONTRACT

Plaintiffs argue the State Lottery Commission has breached the contract entered into between the respective parties. Plaintiffs' argument is two-fold. Plaintiffs contend the State breached the contract by imposing the income tax when the contract barred such an imposition. Also, Plaintiffs claim a breach occurred because the annual installment payments are less than the contract term.

As noted by Plaintiffs, there is no dispute that the purchase of a lottery ticket creates an enforceable contract between the purchaser and the State. It is the terms of this contract that are in dispute.

Plaintiffs argue the contract prohibited the imposition of the income tax. However, Plaintiffs are inferring pro-

hibition from silence. The contract does not make any reference to State taxes at all. Silence by the Lottery Commission regarding a subject (taxes) over which it has no control or authority may not be construed as a prohibition.

Furthermore, by way of analogy, the Federal taxes withheld are similar. The Lottery Commission withholds 20%. However, given the amount of Plaintiffs' total award, they are placed into a higher tax bracket than 20%. Therefore, Plaintiffs are responsible for the additional taxes and obviously may not argue they must only pay what has been withheld by the Lottery Commission.

Lastly, the Lottery Commission, with whom Mr. Couchot contracted, has in no way altered the terms of the payments. The Commission still pays $1,050.000 annually. The only difference is now it is required, pursuant to an enactment of the General Assembly, to withhold State income taxes in addition to the Federal income taxes. We cannot find the Lottery Commission has breached a contract by following newly enacted laws which mandate compliance.

Based upon the foregoing, the Court finds the Lottery Commission has not breached the contract entered into between the Ohio State Lottery Commission and Mr. Couchot.

CONTRACT CLAUSES

Plaintiffs argue imposition of the tax violates Section 10, Article I of the United States Constitution and Section 28, Article II of the Ohio Constitution.

Defendants argue no violation has occurred. They contend no contract existed stating Plaintiffs' winnings were not and/or would not be subject to Ohio income tax. Moreover, Defendants claim the power to tax and to provide for exemptions from taxation is reserved exclusively to the General Assembly. See Section 3, Article XII of the Ohio Constitution.

Section 10, Article 1 of the United States Constitution provides, in pertinent part:

> No State shall . . . pass any . . . law impairing the obligation of contracts . . .

Section 28, Article II of the Ohio Constitution likewise provides in pertinent part:

> The general assembly shall have no power to pass . . . laws impairing the obligation of contracts . . .

It has been held that simply because an enactment has an impact (even a detrimental one) does not mean that it is prohibited by the Contract Clause. There is a balancing which must be employed.

In *Smith v. Denihan* (1990), 63 Ohio App. 3d 559, the appellate court stated the courts have applied a three-step balancing test to exam legislation under the Contract Clause. In citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983), 459 U.S. 400, the court stated:

> The first step is to determine "whether the state law has, in fact, operated as a substantial impairment of a contraetual relationship." If a substantial impairment is found, then the second step is to determine whether the state has a significant and legitimate public purpose for the legislation. If there is such a purpose, then the last step is to determine ". . . whether adjustment of 'the rights and responsibilities of the contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.'" *Denihan* at 570, 571, *Energy Reserves* citations omitted.

The United States Supreme Court has also made the following observation:

> First of all, it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal; [sic] or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Allied Structural Steel Co. v. Spannaus* (1978), 438 U.S. 234, 241-242, citing *Manigault v. Springs*, 199 U.S. 473, 480.

Applying the facts in the case *sub judice* to the above standard, this Court is hard pressed to find a "substantial impairment" of the contract. Plaintiffs' right to receive payments has not been terminated, there has only been a reduction in the amount reecived.

Even assuming, *arguendo*, a substantial impairment exists, there can be no doubt the State has a significant and legitimate public purpose, i.e. raising revenue. The General Assembly's power to tax is the mainstay of our State's economy. Furthermore, the "adjustment" (reduction of payments) is clearly promoting the common wealth and is necessary for the general good of the public.

Accordingly, the Court finds the tax does not violate either of the Contract Clauses found in the Ohio and United States Constitutions.

RETROACTIVE APPLICATION

Plaintiffs argue the tax violates Section 28, Article II of the Ohio Construction and R.C. 1.58. Specifically, Plaintiffs contend they have accrued substantive rights under the contract and imposition of the tax impairs those rights.

Section 28, Article II provides "[t]he general assembly shall have no power to pass retroactive laws . . . R.C. 1.58 states:

> (A) The reenactment, amendment, or repeal of a statute does not . . .:
>
> (1) Affect the prior operation of the statute or any prior action taken thereunder;
>
> (2) Affect any violation, cure, right, privilege, obligation, or liability previously acquired, accrued, accorded, or incurred thereunder . . .

Generally, a statute which imposes a new or additional burden, duty, obligation or liability, as to past transactions, is retroactive. *Miller v. Hixson* (1901), 64 Ohio St. 39.

"The issue of whether a statute may *constitutionally* be applied retrospectively does not arise unless there has been a prior determination that the General Assembly has specified that the statute so apply." *VanFossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 106. "R.C. 1.58 establishes an analytical threshold which must be crossed prior to inquiry under Section 28, Article II." *Id.* at 106.

The effective date of R.C. 5747.02 was July 1, 1989. The State argues the tax is applied to lottery winnings received in taxable years ending after the effective date of the provision. We agree, the tax is prospective in nature.

However, it appears the State has applied the tax retrospectively by including any lottery income received from January 1, 1989 to July 1, 1989. Because Mr. Couchot's March, 1989 installment was included in his Federal adjusted gross income, it was considered for Ohio income tax purposes. However, by using this method, the State has included income received prior to the effective date of the tax. This constitutes retrospective application of the statute and to this extent violates R.C. 1.58 and the Ohio Constitution.

R.C. 5747.02, as it applies to any payments received after its effective date, violates neither R.C. 1.58 or the Ohio Constitution. It is the receipt of income that is the taxable event upon which the income tax is levied. Therefore, the fact that Mr. Couchot won the lottery prior to the effective date is of no consequence.

COMMERCE AND DUE PROCESS CLAUSES

Plaintiffs argue they lack sufficient minimum contacts with Ohio and therefore imposition of the tax violates several constitutional provisions. Specifically, Plaintiffs submit they have never been residents of Ohio nor have they engaged in any business or occupation in Ohio.

In order to pass constitutional muster under the Commerce Clause, a state tax must fulfill four requirements: 1) it must be applied to "an activity with a substantial nexus with the taxing state"/; 2) is must be "fairly apportioned"; 3) it must not "discriminate against interstate commerce"; and 4) it must be "fairly related to the services provided to the State." *Complete Auto Transit, Inc. v. Brady* (1977), 430 U.S. 274.

In the case *sub judice*, Mr. Couchot's winnings resulted from his purchase of an Ohio Lottery ticket in Ohio, wherein his numbers were drawn in Ohio and the State of Ohio pays the award. Clearly, the income which Ohio

seeks to tax is from an event or transaction that occurred in Ohio.

Furthermore, as cited by Defendants, the United States Supreme Court in *International Harvester Co. v. Wisconsin Department of Taxation* (1944), 322 U.S. 435, 441-442, held:

> A state may tax such part of the income of a nonresident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers. . . . And the privilege of receiving dividends derived from corporate activities within the state can have no greater immunity than the privilege of receiving any other income from sources located there.

Accordingly, the Court finds the tax does not violate the Commerce Clause or either of the Due Process Clauses.

Accordingly, the Court finds R.C. 5747.02, R.C. 5747.062 and R.C. 3770.072 are constitutionally valid to the extent enumerated above. Furthermore, the Court finds no breach of contract has occurred by any of the named Defendants.

Counsel for Defendants shall submit appropriate Judgment Entry reflecting the foregoing decision pursuant to court rule.

/s/ David W. Fais
DAVID W. FAIS
Judge

APPENDIX D

STATUTORY PROVISIONS

Sections 1, 12 and 13 of Amended Substitute House Bill Number 111, 1989-1990 Ohio Laws 2330-2833 (effective July 1, 1989), provide in relevant part:

SECTION 1.

. . . .

Sec. 3770.072. THE STATE LOTTERY COMMISSION SHALL DEDUCT AMOUNTS FROM LOTTERY PRIZE AWARDS AND FILE RETURNS IN ACCORDANCE WITH SECTION 5747.062 OF THE REVISED CODE AND ANY RULES ADOPTED BY THE TAX COMMISSIONER PURSUANT TO THAT SECTION.

. . . .

Sec. 5747.01.

. . . .

As used in this chapter:

. . . .

(C) "Nonbusiness income" means all income other than business income and may include, but is not limited to, compensation, rents and royalties from real or tangible personal property, capital gains, interest, dividends and distributions, [or] * patent or copyright royalties, OR LOTTERY WINNINGS, PRIZES, AND AWARDS.

. . . .

Sec. 5747.02. (A) . . . there is hereby levied on every individual and estate residing in or earning or receiving income in this state, AND ON EVERY INDIVIDUAL AND ESTATE EARNING OR RECEIVING LOTTERY WINNINGS, PRIZES, OR AWARDS PURSUANT TO CHAPTER 3770. OF THE REVISED CODE, an annual tax . . . .

. . . .

---

* [Bracketed material struck through on original].

Sec. 5747.062. (A) THE STATE LOTTERY COMMISSION SHALL:

(1) DEDUCT AND WITHHOLD FROM EACH LOTTERY PRIZE AWARD PAYMENT THAT EXCEEDS FIVE THOUSAND DOLLARS AN AMOUNT EQUAL TO THREE AND ONE-HALF PER CENT OF THE PAYMENT, PRIOR TO MAKING ANY OTHER REDUCTION REQUIRED BY CHAPTER 3770. OF THE REVISED CODE;

. . . .

Sec. 5747.20. All items of nonbusiness income or deduction shall be allocated in this state as follows:

. . . .

(B) All items of nonbusiness income or deduction taken into account in the computation of adjusted gross income for the taxable year by a nonresident shall be allocated to this state as follows:

. . . .

(5) ALL LOTTERY PRIZE AWARDS PAID BY THE STATE LOTTERY COMMISSION PURSUANT TO CHAPTER 3770. OF THE REVISED CODE SHALL BE ALLOCATED TO THIS STATE.

. . . .

SECTION 12. Sections 3770.072 and 5747.062 of the Revised Code, as enacted by this act, shall take effect on January 1, 1990.

SESTION 13. (A) Sections 5747.01, 5747.02, . . . and 5747.20 as amended . . . by this act shall take effect at the earliest time permitted by law, but shall first apply to a taxpayer's first taxable year ending on or after the effective date of those sections.

Id. at pp. 2353, 2477, 2612-2613, 2615, 2621, 2628-2629 and 2648.

Supreme Court, U.S.
FILED
[redacted] 4 1996
CLERK

(2)

No. 95-1802

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RICHARD L. and KATHERINE E. COUCHOT,
Petitioners,

v.

THE STATE LOTTERY COMMISSION,
THE OHIO DEPARTMENT OF TAXATION and
J. KENNETH BLACKWELL,
TREASURER OF THE STATE OF OHIO,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

---

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a State impose its income tax on the annual installment payments of the lottery winnings of a nonresident who physically entered the State to play the State's lottery and to claim his prize without offending the Commerce Clause or the Due Process Clause?

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IN THE
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J. KENNETH BLACKWELL,
TREASURER OF THE STATE OF OHIO,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Ohio

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

This case involves the authority of Ohio to impose its income tax on that part of the income of nonresidents which consisted of winnings from playing the State's lottery. In holding that Ohio had sufficient connections under the Due Process and Commerce Clauses to authorize it to exercise its power of taxation over such income, the Ohio Supreme Court applied the well-established principle that a State may tax the income of nonresidents that arises out of events or

transactions that occur in the State. This was the single, narrow issue decided below.

A. Factual Background

The facts are simple and straightforward. On March 2, 1988, Richard L. Couchot, a resident of Kentucky, crossed the Ohio River and physically entered Ohio for the specific purpose of purchasing an Ohio lottery ticket. On that same day, in a drawing held in Ohio, the numbers on Mr. Couchot's ticket were selected as the winning combination. Subsequent to that drawing, Mr. Couchot again physically entered Ohio to claim his prize. Pursuant to the regulations of the Ohio Lottery Commission in effect at that time, Mr. Couchot's prize winnings of $21,000,000 were payable in annual installments over a twenty-year period. It is these annual installments of Mr. Couchot's Ohio lottery prize winnings, and that income alone, that Ohio has subjected to its income tax.

B. The Proceedings Below

The Couchots' statement of the history of the case is essentially correct. Their version of the holdings of the Ohio Court of Appeals and Supreme Court is not. The Court of Appeals, in a decision based on an erroneous conjoining of the unrelated concepts of due process nexus and retroactivity (under the Ohio Constitution), held that Ohio's imposition of its income tax violated the Due Process Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution, section 28, Article II. App. B. 28a. That court did not hold that the tax violated the Commerce Clause. In fact, the court found that the trial court erred in utilizing a Commerce Clause analysis. App. B. 26a.

Nor did the Court of Appeals broadly hold that Ohio could not impose its income tax on Ohio lottery winnings of nonresidents. To the contrary, citing *International Harvester Co. v. Wisconsin Dept. of Taxation*, 322 U.S. 435 (1944), the Court of Appeals found that the redeeming of an Ohio lottery ticket constitutes an event or transaction which would permit Ohio to tax winnings from the lottery. App. B. 27a-28a. It was only because Mr. Couchot won the Ohio lottery prior to a statutory amendment that specifically subjected lottery winnings to Ohio income tax that the court held the imposition to be unconstitutional. App. B. 28a. The timing question, however, raised an issue under the Retroactivity Clause of the Ohio Constitution, not a Due Process nexus issue under the U.S. Constitution.[1]

The Ohio Supreme Court granted review and reversed. Relying on *International Harvester* as well as other authorities, it upheld the State's imposition of income tax on Mr. Couchot's installment payments of Ohio lottery winnings. The Court properly focused on the connection between the State and the income it sought to tax. Finding that such income arose entirely out of an event that occurred exclusively in Ohio, the Court held that the requisite nexus existed.

---

[1] The Ohio Supreme Court held that because the taxable event for income tax purposes is the receipt of income, the imposition of income tax on installments of Ohio lottery prize payments in years after the statutory enactment, which were the only winnings taxed by Ohio, did not offend the State Retroactivity Clause. App. A. 13a-14a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Introduction

This case does not present any momentous constitutional issue that demands this Court's review. Instead, it simply involves the application of an established, fundamental principle regarding the power of the states to tax income of nonresidents. The issue decided below was much narrower than that posed by the Couchots in their petition. Ohio is not seeking to extend its power to tax income of nonresidents to income that has no connection to Ohio. To the contrary, Ohio sought only to tax income of the Couchots which arose out of an event or transaction which occurred wholly within Ohio.

The only income of the Couchots that Ohio taxed were the annual installment payments which Mr. Couchot received as a result of playing and winning the Ohio lottery. It was only that income which Ohio claimed jurisdiction to tax. Ohio has not made any attempt to assert its power of taxation over any other income of the Couchots. Ohio readily concedes that it would have no right to tax such income because none of that other income arose from any event or transaction which occurred in Ohio and Ohio would therefore have no nexus with that other income.

The specific issue is whether Ohio may, within the strictures of the Due Process and Commerce Clauses, tax the annual installment payments of Ohio lottery prize winnings received by nonresidents who played and won the Ohio lottery. The Ohio Supreme Court, applying the controlling decisions of this Court, held that Ohio had sufficient nexus with that income under both the Due Process and Commerce Clauses to authorize the State to exercise its taxing power over that income. In so holding, the Ohio Supreme Court

was guided by the fundamental principle which controls the determination of the constitutional extent of the States' jurisdiction to tax the income of nonresidents:

> A state may tax such part of the income of a non-resident as is fairly attributable either to property located in the state or to events or transactions which, occurring there, are subject to state regulation and which are within the protection of the state and entitled to the numerous other benefits which it confers.

International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U.S. at 441-442.[2]

As the Ohio Supreme Court stated in its opinion below, "[i]t is difficult to imagine a more fundamental exertion of a state's taxing power than where the state taxes income on winnings from its lottery." App. A. 8a. A review of the nature of the event from which the income arose and the facts bears out this statement. The sole source of all of the income subjected to Ohio income tax was an event that occurred wholly and uniquely within Ohio -- the playing and winning of the Ohio lottery. *See* Ohio Revised Code Chapter 3770. The Ohio lottery is conducted exclusively within the State and is subject to regulation by the State. Ohio law defines the nature and extent of the rights [illegible]hose who participate in the Ohio lottery. Not only

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[2] Contrary to the Couchots' claim (Pet. at 5, 11), the Ohio Supreme Court did not rely exclusively on *International Harvester*; it cited numerous other cases which supported the Court's holding. App. A. 7a. *International Harvester* is, however, the controlling authority and the holding in that case is both relevant and correct.

did the event out of which all of the income at issue arose occur in Ohio, but by its very nature it could have occurred only in Ohio.

Mr. Couchot physically entered Ohio for the purpose of playing the Ohio lottery. He purchased his lottery ticket in Ironton, Ohio. The lottery drawing in which the numbers on Mr. Couchot's ticket were selected as the winning numbers was conducted in Ohio. The prize was awarded and claimed in Ohio. Thus, the income that Ohio taxed arose directly and exclusively from Mr. Couchot's purchase in Ohio of an Ohio lottery ticket. Not only did Ohio have sufficient minimum contacts with this event, it had all of the relevant contacts.

This pervasive connection between the event out of which the income sought to be taxed arose and Ohio far exceeds the minimum contacts or nexus required to meet the requirements of the Due Process or Commerce Clauses. The Ohio Supreme Court properly so held. While the Ohio Supreme Court did hold that the physical-presence requirement reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), in the area of out-of-state sellers' liability to collect and remit sales and use tax had not been adopted by this Court concerning other types of state taxes, as this Court expressly stated in *Quill*, 504 U.S. at 317, what the Couchots conveniently and consistently ignore is that the Ohio Supreme Court did not stop there. Instead, that Court held that even if the physical-presence requirement was applicable it was satisfied. App. A. 11a. It clearly was. As the Ohio Supreme Court pointed out, Mr. Couchot physically entered Ohio for the specific purpose of engaging in the very activity out of which the income arose -- playing the Ohio

lottery. He also came into Ohio to claim his prize.[3]

The decision of the Ohio Supreme Court falls squarely within the holding in *International Harvester*. *International Harvester* held in no uncertain terms that a state may tax the income of a nonresident which is attributable to events occurring in the state.

The holding of the Ohio Supreme Court was a narrow one, and one supported by well-established precedent. Nor, contrary to the Couchots' bare assertions, is that holding in conflict with any other state or federal court. Not a single decision cited by the Couchots is in any way in conflict with the opinion below. In point of fact, it is consistent with the only other state court decision which addressed the same issue, *Stark v. Comptroller*, 554 A.2d 458 (Md. Ct. of Special Appeals 1989), *cert. denied*, 559 A.2d 791 (Md. 1989).

II. The Ohio Supreme Court Correctly Held That A State May Impose Its Income Tax On The Winnings Of A Nonresident From Playing And Winning That State's Lottery.

The Ohio Supreme Court did not hold that Ohio has the power to impose its income tax on Mr. Couchot, a nonresident. Its holding was much narrower. It held only that Ohio could impose its income tax on that part of Mr. Couchot's income that arose out of Mr. Couchot's playing

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[3] The Couchots' incredulity at the fact that under the State's position nexus "lasts" for twenty years (Pet. at 5) fails to discern the plain fact that the nexus with the income at issue "lasts" for that period simply because the income from the Ohio event -- the playing and winning the Ohio lottery -- is paid out over a twenty-year period.

and winning the Ohio lottery, an event that occurred wholly within Ohio.[4] That, of course, is precisely the holding of *International Harvester*.

The Couchots' contention that the Ohio Supreme Court's decision raises substantial questions regarding the authority of states to tax income of foreign corporations which have no physical presence in the state grossly overstates that decision. The case does not involve a tax on corporations. Moreover, although the Ohio Supreme Court noted that *Quill* stated that the physical-presence test had not been adopted outside the sales and use tax area, it held only that the test was not applicable in this case which involves only personal income taxes. More importantly, the Ohio Supreme Court held that even if that requirement were applicable, it was satisfied because Mr. Couchot physically entered Ohio to purchase the lottery ticket at issue. Thus, even if this Court might consider it important to decide whether the physical-presence test should be applied to a state's imposition of corporate income taxes on income of foreign corporations, this case is not the appropriate vehicle. This case simply does not present that question.

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[4] The Couchots are plainly wrong when they assert that the constitutional question is not whether Ohio has the authority to tax the income from an event which occurred in Ohio but whether Ohio has authority to tax Mr. Couchot. Pet. at 6 n. 5. The Couchots' statement that the location of the event which produced the income is not relevant to a determination of the State's authority to tax exemplifies the illogic of their argument. It is precisely because it is an income tax which is at issue that the location of the event out of which that income arose is not only relevant, but critical. As *International Harvester*, *Shaffer v. Carter*, 252 U.S. 37 (1920) and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) confirm, whether a state has nexus to tax income of a nonresident depends solely on whether the income sought to be taxed arises from an event which occurred in the State. The connection with the State must necessarily relate to the income, because that is what is being taxed.

III. *In Re State Tax On Foreign-Held Bonds* Is Inapposite And Of Questionable Vitality.

The Couchots' argument that the Ohio Supreme Court's decision is in conflict with *In re State Tax on Foreign-Held Bonds*, 82 U.S. (15 Wall.) 300 (1872), is clearly wrong. As the Couchots concede, the tax at issue in *In re State Tax on Foreign-Held Bonds* was a property tax, not an income tax; it thus is inapposite for that reason alone.[5] But even if the income at issue arose out of intangible personal property rather than out of an event, the situs of that property for tax purposes would be irrelevant. With respect to income, the relevant consideration is the location of the source of the income at issue.

In re State Tax on Foreign-Held Bonds is inapposite in still another respect. The bonds at issue in that case were held outside of the taxing state. 82 U.S. (15 Wall) at 325. Its holding thus has been limited to the narrow proposition that bonds held out-of-state cannot be taxed. *Savings & Loan Society v. Maltnowah County*, 169 U.S. 421, 428 (1897); *Blackstone v. Miller*, 188 U.S. 189, 206 (1902).

In all events, reliance on *In re State Tax on Foreign-Held Bonds* for the view that intangible property could only be taxed by the state of the owner's domicile fails for a more fundamental reason. That proposition, adopted in *Farmers' Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1929), and followed in *First Bank of Boston v. Maine*, 284 U.S. 312

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[5] Even if property which is the source of the income sought to be taxed by a state is immune from taxation by that state, the income is not clothed with that immunity; whether such income can be taxed by the state is not affected by the character of the property which is its source. *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313-314 (1937).

(1931), was repudiated in *Curry v. McCanless*, 307 U.S. 357 (1939), and expressly overruled in *State Tax Commission v. Aldrich*, 316 U.S. 174 (1942). The holding in *Curry* is clear:

> Shares of corporate stock may be taxed at the domicile of the shareholder and also at that of the corporation which the taxing state has created and controls; *and income may be taxed both by the state where it is earned and by the state of the recipient's domicile.*

307 U.S. at 368 (emphasis added). The "sweeping" nature of *Curry* and its repudiation of *Farmers' Loan* has been noted by commentators. 2 J. Hellerstein & W. Hellerstein, State Taxation ¶21.14[1], at 21-43 (2d ed. 1992).

Nor do *Shaffer v. Carter, supra*, and *Travis v. Yale & Towne Mfg. Co., supra*, lend any support to the Couchots' argument. Instead, they support the holding below. Both *Shaffer* and *Travis* properly focused their nexus inquiry on the income being taxed, not on the person or entity receiving that income. *Shaffer* clearly noted that a state could impose a tax "upon incomes accruing to nonresidents from their property or business within the state ...." 252 U.S. at 52.

The claim that *Shaffer* and *Travis* set the outer limits of a state's power to tax the income of a nonresident reads those decisions too narrowly and ignores *International Harvester*. *Shaffer* and *Travis* simply addressed the type of income involved in those cases. Neither decision held that a state could not tax income of a nonresident which arose out of a source within the state unless that source was a business operation or work performed. Any such notion is rejected by *International Harvester* which broadly applied the language of *Shaffer*. *See* Hellerstein & Hellerstein, *supra*,

¶20.05[1], at 20-15 n. 76. This Court's reference to the *Shaffer* holding in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222 n. 11 (1995) does not support the Couchots' narrow view:

> ... as to nonresidents, "the tax is only on such income as is derived from ... sources [within the State]." (bracketed material by the Court).

The Couchots' statement that this Court has never expanded *Shaffer's* reach to a nonresident who lacks a physical presence in the taxing state likewise ignores *International Harvester* in which the Court stated that "the fact that the stockholder-taxpayers never enter Wisconsin ... cannot deprive it of its jurisdiction to tax." 322 U.S. at 443. See also *New York ex rel. Whitney v. Graves*, 299 U.S. 366 (1937) (income of nonresident from the sale of an interest in membership on New York Stock Exchange taxable by New York even where taxpayers never physically entered New York.) Moreover, whether physical presence is a requirement is not relevant in this case because, as discussed earlier, Mr. Couchot had a physical presence in Ohio -- he physically entered Ohio to participate in the very event out of which the income arose. The Couchots' constant focus on physical presence is simply a red herring.

IV. *International Harvester* Is Relevant, Correct And Controlling.

The assertion that *International Harvester* is irrelevant or wrong lacks merit. *International Harvester* held in no uncertain terms that a state may tax the income of a nonresident which is attributable to events or transactions occurring within the state. The tax at issue in that case was not imposed on the corporation, but was, as the Court said,

"in point of substance laid upon and paid by the stockholders ...." 322 U.S. at 443-444. The Couchots' point that this Court has cited *International Harvester* regarding the authority of a state to tax the income of foreign corporations misses the fact that the same principle is applicable to both nonresident individuals and foreign corporations. This Court noted this fact in the very footnote in *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 356 n. 18 (1954), referenced by the Couchots. What the Couchots fail to note is that the correctness of the holding in *International Harvester* has never been questioned in any subsequent decision of this Court.

The Couchots state that the fact alone that *International Harvester* was decided prior to *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1976), raises substantial doubts as to its vitality. They fail, however, to give any explanation for this statement. *Complete Auto* did not effect a change in the nexus requirement. It addressed and rejected the formalistic distinction between "direct" and "indirect" taxes on interstate commerce that had been applied in earlier decisions. *See Quill Corp.*, 504 U.S. at 310. In fact, the Couchots' reliance on *Quill* fails to recognize the fact that the Commerce Clause nexus test for sales and use taxes upheld in that case was one adopted in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), which itself was decided prior to *Complete Auto*.

V. The Decision Of The Ohio Supreme Court Is Not In Conflict With Decisions Of Any Other State Or Federal Court.

The Couchots' contention that the decision below is in conflict with those of other state and federal courts is wrong. Not a single one of the decisions cited by the Couchots involved a personal income tax, or any income tax

imposed on income that arose directly and exclusively out of an event which occurred within the taxing state. There is no decision that has questioned the constitutional authority of a state to exercise its power of taxation over such income of a nonresident individual or corporation.[6]

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[6] Instead, the cases cited involve: (i) sales taxes, *Laptops Etc., Corp. v. D.C.*, 164 B.R. 506 (Bankr. D.Md. 1993) (physical presence necessary to enable the State to impose tax collection obligation upon the vendor); (ii) corporate income and franchise taxes, *Watlow Winona, Inc. v. Comm'r of Revenue*, 495 N.W.2d 427 (Minn. 1993) (whether business was unitary, thus allowing State to include all income, not just that arising directly from activity in the State, in the apportionable income under the unitary business principle; Court also held that *Quill* effected no change in the applicable legal principles and was simply not on point), *Erieview Cartage, Inc. v. Pa.*, 654 A.2d 276 (Pa. Commw. Ct. 1995) (physical-presence test not referenced or applied; *Quill* cited only in Due Process Clause portion of the opinion), *Lawrence Industries, Inc. v. Sharp*, 890 S.W.2d 886 (Tex. App. 1994) (decision included only a Due Process Clause issue; it contained no reference to the physical-presence requirement of *Quill*), *Polychrome Int'l Corp. v. Krigger*, 5 F.3d 1522 (3d Cir. 1993) (No reference to or adoption of physical-presence test); (iii) a county business activity license tax, *Short Brothers (USA), Inc. v. Arlington County*, 423 S.E.2d 172 (Va. 1992); (iv) the unique Michigan Single Business Tax, *Gilette Co. v. Mich.*, 497 N.W.2d 595 (Mich. App. 1993), *appeal denied*, 519 N.W. 2d 156 (Mich. 1994), *cert. denied*, 115 S.Ct. 779 (1995) and *Guardian Indus. Corp. v. Mich.*, 499 N.W. 2d 349 (Mich. App. 1993), *appeal denied sub nom. Cargill Inc. v. Mich.*, 512 N.W. 2d 846 (Mich. 1994); (v) and personal property taxes, *Beelman Truck Co. v. Bd. of Equalization*, 861 S.W.2d 557 (Mo. 1993), *Diamond Shamrock Ref. & Mktg Co. v. Appraisal District*, 876 S.W. 2d 298 (Tex. 1994), *cert. denied*, 115 S.Ct. 500 (1994), *Vinmar, Inc. v. Appraisal District*, 890 S.W.2d 493 (Tex. App. 1994), and *Ryder Truck Rental, Inc. v. Chesterfield County*, 449 S.E.2d 813 (Va. 1994) (by their very nature, personal property taxes apply only to tangible personal property physically located in the state; not one of these cases contain any reference to *Quill's* physical-presence test; because the property at issue was in the taxing state in each case, physical presence was not an issue).

The Couchots' statement that the decision of the Ohio Supreme Court below and the decision of the South Carolina Supreme Court in *Geoffrey, Inc. v. South Carolina Tax Comm'n*, 437 S.E.2d 13 (S.C. 1993), *cert. denied*, 114 S.Ct. 550 (1993), are the only two decisions which have refused to adopt *Quill's* physical-presence test in an income tax context is misleading. Initially, *Quill* itself noted that the physical-presence test had not been adopted outside of the sales and use tax area. Second, the Ohio and South Carolina Supreme Courts are not in a minority of state courts on this issue. They are the only two state supreme courts that have been presented with the specific issue. There are no contrary decisions.

Even if there were inconsistent decisions on whether the physical-presence requirement applied to income taxes, this case would be an inappropriate vehicle for reviewing the issue: in this case, as the Ohio Supreme Court found and as the facts conclusively establish, there was a clear physical presence in Ohio and that physical presence was directly related to the income over which Ohio exercised its power of taxation. A clearer example of nexus is difficult to imagine.

VI. The Decision Of The Ohio Supreme Court Is Narrow With Clearly-Defined Boundaries.

The Couchots' claim that under the Ohio Supreme Court's decision the State's power to tax is boundless exaggerates the scope of the decision. The holding is both narrow and clearly-defined. The Ohio Supreme Court held that Ohio could impose its income tax on Ohio lottery winnings of a nonresident who entered Ohio to participate in the Ohio lottery and claimed his prize in Ohio. This was the only income which Ohio subjected to tax. The case does not involve whether Ohio could tax income of nonresidents from annuities purchased in Ohio, interest on accounts in Ohio

financial institutions or dividends paid by corporations doing business in Ohio. Instead, the income taxed is that arising out of an event or transaction which by its very nature is localized in Ohio. *Cf. New York ex rel. Whitney v. Graves*, 299 U.S. at 372-373. Ohio did not claim nexus over any other income.

The decision of the Ohio Supreme Court is in full accord with the decisions of this Court. As in *International Harvester*, the incidence of the tax is tied to the income which the taxing state made possible. As in *Aldrich*, the payment depends upon and involves the law of the taxing state for its exercise. Not only did the income realized by Mr. Couchot depend upon and involve the laws of Ohio, but the event from which that income derived owed its very existence to those laws. The laws of Ohio, and only the laws of Ohio, made that income possible. Also, as in *Aldrich*, Ohio law defines the nature and extent of the right of the person entitled to the income and affords that person protection for those rights.

This case presents an even clearer situation than that in *International Harvester*. Unlike the nonresident stockholders in *International Harvester*, Mr. Couchot actually entered Ohio. His entry into Ohio was for the specific purpose of engaging in the very activity out of which the income arose. He entered Ohio to purchase a lottery ticket which purchase formed the contract out of which the income at issue arose. The annual payments to Mr. Couchot by the State are made pursuant to that contract entered into in Ohio and enforceable in Ohio. When reviewed in light of the actual holding and the facts, the decision is unassailable. It is both well-defined and correct. It does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 95-1802

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

RICHARD L. AND KATHARINE E. COUCHOT,
Petitioners,

v.

THE STATE LOTTERY COMMISSION,
THE OHIO DEPARTMENT OF TAXATION, AND
J. KENNETH BLACKWELL,
TREASURER OF THE STATE OF OHIO,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

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REPLY OF THE PETITIONER

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REPLY OF THE PETITIONER

Respondents misstate the constitutional significance of this case and the scope and extent of the Ohio Supreme Court's errors.

1. Respondents attempt to limit the applicability of this case to nonresident individual lottery winners. But the significance of this case is far greater. In upholding Ohio's authority to tax Mr. Couchot, the Ohio Supreme Court employed reasoning which every State can—and certainly will—use to tax *any* income an individual re-

ceives from intangible property which has at any time been associated with the taxing State. The Ohio Supreme Court's reasoning is easily broad enough to tax a nonresident individual's annuity income, interest income and dividend income, if that income arises from a transaction with an Ohio "source." It certainly will not be long before the States do so.

Moreover, the constitutional principles applicable to nonresident individuals apply with equal force to nonresident (foreign) corporations. This Court has *never* held that the jurisdictional standards under the Due Process and Commerce Clauses apply to individuals, but not corporations, or that they apply differently to the two. Indeed, Respondents concede that the jurisdictional standards are the same. Opp. at 12, *citing Miller Bros. Co. v. Maryland*, 347 U.S. 340, 356 n.18 (1954) (the jurisdictional standards announced in *International Harvester Co. v. Wisconsin Dept. of Taxation*, 322 U.S. 435 (1944), are "applicable to both nonresident individuals and foreign corporations.") Thus, as even the Respondents concede, the dangers of the Ohio Supreme Court's decision are equally real for corporations, a fact which itself demonstrates the constitutional significance of this case.

2. Notwithstanding Respondents' claims to the contrary, the constitutional question in this case is whether, in 1989 and thereafter, Ohio has the authority to tax *Mr. Couchot*. Pet. at 6-7 n.5. In answering this question, the circumstances of the *1988* "transaction" which produced Mr. Couchot's income are irrelevant, because Respondents have conceded that Mr. Couchot won the Ohio lottery *before* Ohio taxed the lottery winnings of nonresidents. Thus, stated most simply, the question is this: in *1989*, when Ohio *first* taxed the lottery winnings of nonresidents, did Ohio have a sufficient constitutional nexus with Mr. Couchot?

Ohio clearly did not. Since 1988, the Couchots have had absolutely no connection with Ohio other than the

connection which arises from the debt Ohio owes Mr. Couchot and the annual payment Ohio mails to Mr. Couchot in Florida. Pet. at 3. Moreover, the events which occurred in 1988, and the "physical presence" which Respondents claim arises from those events, are wholly irrelevant in 1989. Any "physical presence" or other "nexus" which may have existed in 1988, clearly did *not* exist in 1989 and thereafter, and cannot give Respondents jurisdiction to tax Mr. Couchot in 1989 and thereafter.

3. Respondents fail to distinguish *In re State Tax on Foreign-Held Bonds*, 82 U.S. (15 Wall.) 300 (1872). Respondents assert that *In re State Tax on Foreign-Held Bonds* is irrelevant because it is a property tax case. That claim has already been answered. Pet. at 8 n.8. *See also International Harvester*, 322 U.S. 435, 441, *citing Shaffer v. Carter*, 252 U.S. 37, 55 (1920), and *Lawrence v. State Tax Commission*, 286 U.S. 276, 280 (1932) ("In determining whether a tax is within the state's constitutional power, we look to the incidence of the tax and its practical operation.")

Respondents assert that *In re State Tax on Foreign-Held Bonds* is irrelevant because the situs of Mr. Couchot's property is irrelevant. This overlooks the fact that, *if* Mr. Couchot owned property in Ohio in 1989, that property *might* provide Ohio with the constitutional nexus it seeks. *See Shaffer v. Carter* at 52-53 (limiting a State's jurisdiction to tax a nonresident individual to the income from "property located or business conducted" in the taxing State); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 75 (1920) (to the same effect). But because Mr. Couchot's property—his debt from Ohio—is situsd to his residence, he owned no property in Ohio in 1989 and thereafter, a fact which proves that Ohio has no jurisdiction to tax him.

Respondents also emphasize that the bonds in *In re State Tax on Foreign-Held Bonds* were held *outside* the

taxing State, and that the holding of the case "thus has been limited to the narrow proposition that bonds held out-of-state cannot be taxed." Opp. at 9. Of course, this is precisely the Couchots' argument. As in *In re State Tax on Foreign-Held Bonds*, Mr. Couchot's intangible property is situsedand held by him in Florida, *not* Ohio. Thus, as in *In re State Tax on Foreign-Held Bonds*, the income from Mr. Couchot's debt cannot be taxed by Ohio any more than Ohio could impose a property tax on the debt itself.

Finally, Respondents misleadingly imply that *In re State Tax on Foreign-Held Bonds* has been overruled. Actually, what was overruled is the principle that intangible property can only be taxed by the state of the owner's domicile. Opp. at 9-10. However, the doctrine of *mobilia sequuntur personam*—the doctrine utilized in *In re State Tax on Foreign-Held Bonds* and the doctrine on which the Couchots rely—remains valid today. *Cf. Delaware v. New York*, 507 U.S. 490, 503-504 (1993); *Texas v. New Jersey*, 379 U.S. 674, 680 (1964), *citing In re State Tax on Foreign-Held Bonds* (both analyzing the applicability of the doctrine of *mobilia sequuntur personam* in the context of State escheat laws). Thus, the fact that this Court overruled a *different* principle enunciated in *In re State Tax on Foreign-Held Bonds* is irrelevant. Respondents' reliance on *New York ex rel Whitney v. Graves*, 299 U.S. 366 (1937), similarly ignores the fact that the intangible property at issue in that case had acquired a "business situs" in New York which justified New York's taxation of the income from the property's sale. But the "business situs" exception to the doctrine of *mobilia sequutnur personam* is patently not applicable to Mr. Couchot's debt from Ohio.

4. Respondents say surprisingly little about *International Harvester*, and what they do say misses the mark.

Respondents emphasize that this Court viewed the tax in *International Harvester* as a tax on the nonresident-shareholder, not the corporation. The Couchots recognize

that fact. Pet. at 11. But this Court's *subsequent* treatment of *International Harvester*—as a case involving a tax on a *corporation*, *not* an individual—raises substantial questions as to the case's vitality. *Id.* Moreover, the fact that "*International Harvester* has never been questioned in any subsequent decision of this Court," Opp. at 12, is more a reflection of the fact that *International Harvester* has not been *cited* by this Court in *forty* years, than it is that *International Harvester* remains good law.

The reason it is imporant that *International Harvester* was decided before *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1976), Opp. at 12, is because *International Harvester* did *not* present a Commerce Clause challenge to the tax. Pet. at 11-12. For that reason alone, therefore, even if the Respondents are correct that *International Harvester* is "relevant, correct and controlling"—which the Couchots dispute—it is *only* "relevant, correct and controlling" as to the Due Process Clause. Respondents have implicitly conceded that this Court has *never* applied the Commerce Clause to facts like those in *International Harvester*. Indeed, Respondents' comparison of this case to *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), is especially apt. This Court should review this case for the same reasons it reviewed the lower court's decision in *Quill*: subsequent developments in federal constitutional law have raised significant doubts as to the continuing validity of a prior decision of this Court; in this case, *International Harvester*.

5. The Ohio Supreme Court's decision conflicts with the decisions of other federal and state courts. The Ohio Supreme Court rejected the *Quill* "physical presence" test. Yet most federal and state courts have adopted that test in cases involving income taxes *and* other taxes. Pet. at 13-14. Respondents' statement that these other cases did not involve personal income taxes imposed on nonresident lottery winners is simply not responsive.

Furthermore, *Stark v. Comptroller*, 554 A.2d 458 (Md. Ct. Spec. App. 1989), *cert. denied*, 559 A.2d 791 (Md. 1989), is no better than the authorities it cites, which are the same authorities the Ohio Supreme Court cited in this case. The fact that the Ohio Supreme Court reached the same incorrect decision as a lower Maryland court is of no moment.

CONCLUSION

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

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